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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Petitioner,

vs.

LUIS CARLOS ARANGO, a/k/a
CARLOS LUIS ARANGO,
Florida Inmate No. 075042,

Respondent.

On Petition for a Writ of Certiorari
to the United States
Court of Appeals
for the Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

I

WHETHER THE UNITED STATES COURT OF APPEAL CAN CAN VACATE A PROPERLY ENTERED JUDGMENT OF A UNITED STATES DISTRICT COURT ON A STATE PRISIONER PETITIONER'S FEDERAL HABEAS CORPUS PETITION, WITHOUT REACHING THE MERITS, AND ORDER THE DISTRICT COURT TO HOLD THE PETITION IN ABEYANCE UNTIL THE STATE PETITIONER HAS EXHAUSTED OTHER CLAIMS PENDING IN THE STATE COURTS?

II

WHETHER A UNITED STATES DISTRICT COURT ABUSES ITS DISCRETION WHEN IT DENIES A PETITIONER'S MOTION FOR CONTINUANCE AND DECIDES THE ISSUES IN AN EXHAUSTED HABEAS CORPUS PETITION ON THE MERITS, IN LIEU OF HOLDING THE PETITION IN ABEYANCE UNTIL OTHER CLAIMS PENDING IN STATE COURT HAVE BEEN EXHAUSTED, THEREBY LEAVING THE HABEAS CORPUS PETITIONER TO THE RISKS OF A SECOND FEDERAL PETITION ON THE NEW CLAIMS?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983). (A 63-75).[1] The opinion of the United States Court of Appeal for the Eleventh Circuit on Petition for Rehearing and Suggestion for Rehearing En banc is not yet reported and is contained in the appendix. (A. 88-96). The opinion of the United States District Court for the Southern District of Florida is reported at Arango v. Wainwright, 563 F.Supp. 1353 (S.D. Fla. 1983). (A. 1-62; 80-87)

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[1] The symbol "A" is used to designate the appendix to this brief.

The opinions[3] of the Supreme Court of Florida are reported at Arango v. State, 411 So.2d 172 (Fla. 1982). (A. 130-138). Arango v. State, 437 So.2d 1099 (Fla. 1983) (A. 98-129).

II

JURISDICTION

On September 23, 1983, the United States Court of Appeals for the Eleventh Circuit reversed the ruling of the United States District Court for the Southern District of Florida denying Respondent's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Petitioner filed a Petition for Rehearing and Suppresion for Rehearing En Banc. On July 31, 1984, the Court denied the petition and suspension.

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Rule 17 of the Rules of

the Supreme Court and Title 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

The Respondent, Luis Carlos Arango a/k/a Carlos Luis Arango is presently in the custody of Petitioner Louie L. Wainwright, Secretary, Florida Department of Corrections, pursuant to a valid judgment of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent was convicted , after trial by jury, of first degree murder and possession of cocaine. He was sentenced to death by electrocution as to the murder conviction and to a term of five years' imprisonment in the state penitentiary, to run concurrently. (A. 64-76).

Respondent appealed from his conviction to the Supreme Court of Florida. The Court affirmed Respondent's convictions and sentences. Arango v. State, 411 So.2d 172 (Fla. 1982). This Court denied a

petition for writ of certiorari filed by Petitioner. Arango v. Florida, ___U.S.___, 102 S.Ct. 2973(1982).

On September 29, 1980., while Respondent's direct appeal was pending, he joined other death row inmates in filing for habeas corpus relief based upon the allegation that the Florida Supreme Court had received and reviewed extra-record information concerning capital defendants. The Florida Supreme Court denied the petition and this Court denied review. Brown v. Wainwright,392 So.2d 327 (Fla.), cert. denied, 454 U.S. 1000(1981).

On January 3, 1983, Respondent filed a motion for post-conviction relief in the state trial court. No hearing was requested the motion until after the Governor of Florida had signed a death warrant. The Florida Supreme Court stayed Respondent's

execution.

The respondent subsequently filed an exhausted petition for writ of habeas corpus in the United States District Court for the Southern District of Florida. On May 6, 1983, the district court entered a final order and memorandum opinion denying the petition. The Supreme Court of Florida rendered its decision on appeal from the denial of the motion for post-conviction relief. (See A. 98-129).

Appellate proceedings from the district court's denial of the habeas corpus ensued. The United States Court of Appeals reversed and vacated the district court's order. Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983). The State's Petition for Rehearing and Suggestion for Rehearing en banc was subsequently denied. (A64-76).

IV

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE COURT OF APPEALS IS IN EXPRESS CONFLICT WITH THE COURT'S DECISIONS IN ROSE V. LUNDY, 455 U.S. 509 (1982) AND BAREFOOT V. ESTELLE, ___ U.S. ___, 103 S.Ct. 3383 (1983).

The United States District Court for the Southern District of Florida was presented, in the instant case, with an exhausted petition for a writ of habeas corpus filed pursuant to Title 28 U.S.C. § 2254 by a state prisoner sentenced to death. The petitioner below (Respondent) filed a motion for continuance of the proceedings

in the district court on the grounds that other claims were pending in the state court. The motion was denied and a hearing was held as to the exhausted petition. The district court subsequently entered a memorandum order denying the petition. (A.

In reviewing, on appeal, the propriety of the district court's order, the United States Court of Appeals for the Eleventh Circuit, vacated and reversed the district court's ruling holding that the federal habeas corpus proceeding should be held in abeyance, in the

interest of judicial economy. Arango v. Wainwright, 716 F.2d 1353, 1355 (11th Cir. 1983). (A. In its opinion, the appellate court recognized that the petition before the distrcit court was exhausted and that if Respondent had included the unexhausted claims, the district court would have had to dismiss the petition. The court cited to Rose v. Lundy, 455 U.S. 509, 520 (1982) and acknowledged that failure to include unexhausted claims could cause the Respondent to lose the opportunity to litigate the unexhausted claims in the future. The court ultimately reached a

contrary conclusion, however, and held that Respondent had not waived the claims asserted in state court. The court went on to conclude that the state court proceedings could potentially moot out the federal proceedings because past experience in death cases indicated that if relief is denied in the state court, Respondent would assert those claims in a successive petition in federal court and would probably incorporate some of the claims asserted in the exhausted petition, and that since there was no time limit within which such a successive petition would be filed, issues considered in the instant appeal might require

reconsideration on a second petition.[13]

Although the United States Court of Appeals for the Eleventh Circuit acknowledged this court's decision in Rose v. Lundy, supra, in its opinion, its ultimate conclusion is nonetheless contrary to this court's dictates in that case. Contrary to the court's assertion in its denial of Petitioner's Petition for Rehearing and Suppression for Rehearing En Banc, the court's opinion has the effect of allowing a state petitioner in a death case to circumvent the rules expressed in Rose v. Lundy, through the use of dilatory tactics.

Under the opinion of the Eleventh Circuit, a state petitioner in a death case may delay bringing his collateral attack on his conviction and sentence in state courts and then due to an outstanding death warrant, go to federal court for a stay of execution in order to continue the proceedings until after the state proceedings have concluded.

The above import of the case is that it deprives district court's in the circuit from acting within their discretion in ascertaining whether the standards of Rose v. Lundy, supra, have been met. In

Rose v. Lundy, supra, this court specifically quoted pertinent language from its decision in Sanders v. United States, 373 U.S. 1, 18 (1963); noting that:

> ...Nothing in the traditions of habeas corpus requires the federal court to tolerate needless piecemeal litigation or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

In fact, the State Supreme Court condemned tactics of Respondent's counsel in this particular case in waiting until the "midnight hour" in raising the "new" claims in question. Arango v. State, 437 So.2d 1099 (Fla. 1983).

Thus, the opinion of the United States Court of Appeals for the Eleventh Circuit as it presently stands does provide a means by which this Court's dictates in Rose v. Lundy, can be circumvented. The cases are therefore in conflict and this Court is urged to accept jurisdiction over this case in order to resolve the inconsistency between the two cases.

Respondent further submits that the federal appellate court's decision in this case is contrary to this court's pronouncements in Barefoot v. Estelle, ___U.S.___, 103 S.Ct. 3383 (1983). In Barefoot v. Estelle, supra, this court stated that federal courts are not forums in which to

relitigate state trials and that even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely. The Eleventh Circuit's opinion on rehearing states that this case was based on "unusual circumstances." This Court has made it clear that the nature of the sentence imposed should not change the scope of the court's analysis. The Eleventh Circuit's opinion is therefore clearly contrary to this court's pronouncements in Barefoot v. Estelle, supra, and Petitioner urges this Court to resolve said conflict.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE SAME COURT'S DECISION IN THOMPSON V. WAINWRIGHT,714 F.2d 1495 (11th Cir . 1983).

The decision of the United States Court of Appeals in the instant case is in conflict with the same Court's decision in Thompson v. Wainwright, 714F.2d 1495 (11th Cir. 1983) cert. denied ____U.S.___(Case No. 83-1421; Opinion filed May 2, 1984)[35 Cr.L. 4029]. The converse factual situation was presented in Thompson, supra. In Thompson, the petitioner was a death row inmate who had filed an exhausted petition for writ of habeas corpus and a motion for continuance due to

pendency of claims in state court. The State objected to the continuance and attempted to waive any exhaustion challenge to the pending claims. The Court held that a district court can grant a continuance, in its discretion, and tht it was within the Court's discretion to either accept or reject the State's waiver. In Thompson, supra, the Court stated:

> The district court could have denied a delay, decided the issues that were alleged in the petition, and left Thompson to the risks of a second federal petition on the two claims. But no rule or policy required it to do so.
>
> 714 F.2d 1500.

In accordance with Thompson, supra, the distict court could have properly denied the motion for continuance without abusing his discretion . It

would then be in the habeas petitioner's discretion to assume the risks of filing a second federal petition. It was not an issue before the Court to decide whether the filing of a subsequent petition would constitute an abuse of the writ. It is readily apparent that the instant opinion is inconsistent with Thompson and that the issues presented herein are of significant national importance. This Court is therefore urged to grant the writ of certiorari sought herein.

V

CONCLUSION

This Court is therefore urged to accept this case to resolve the conflict concerning the instant issues of compelling national importance.

RESPECTFULLY SUBMITTED on this _____day of 1984, at Tallahassee, Florida.

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-1077-CIV-EPS

LUIS CARLOS ARANGO a/k/a
CARLOS LUIS ARANGO,
Florida Inmate No. 075042,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.
_____/

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS,
VACATING STAY OF EXECUTION
AND MEMORANDUM OPINION

THIS CAUSE came before the Court on Petition for Writ of Habeas Corpus filed on behalf of Petitioner, LUIS CARLOS ARANGO a/k/a CARLOS LUIS ARANGO

(Arango) pursuant to Title 28, United States Code, Section 2254. Arango raised several constitutional grounds for relief. However, this Court finds no merit in Arango's petition and, therefore, it is dismissed. Moreover, in light of this decision dismissing the petition for writ of habeas corpus, the say of execution heretofore entered on April 27, 1983 is vacated.

I. BACKGROUND

Arango was convicted in the Circuit Court of the Eleventh Judicial Circuit, in and for

Dade County, Florida, of first degree murder and possession of a controlled substance. Petitioner was sentenced to death by electrocution on the first degree murder conviction, and to a term of five (5) years imprisonment in the state penitentiary on the conviction for possession of cocaine, this latter sentence to run concurrently.

On direct appeal to the Florida Supreme Court, Arango raised the following issues: that the trial court (improperly denied his motion to suppress evidence obtained as the result of an unlawful, warrantless entry into his apartment; that the

trial Court's instruction to the jury at the penalty phase unconstitutionally shifted to him the burden of proving that the mitigating circumstances outweighed the aggravating circumstances; that the trial court's instructions of the "especially heinous, atrocious or cruel" aggravating circumstances was inadequate and the trial court refused to give instructions properly defining these terms; that the trial court erred in allowing the prosecution to introduce the irrelevant and inflamatory testimony of the medical examiner to prove the applicability of the terms heinous, atrocious or cruel; that

the death penalty was a disapro-portionate punsishment; and that the trial court improperly excused a venireman for cause over defend-ant's objection in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). The Florida Supreme Court affirmed both the convictions and the sentence. Arango v. State, 411 So.2d 172 (Fla. 1982), and the United States Supreme Court declined to review that decision. Arango v. Florida, ____ U.S. ____, 102 S.Ct. 197 (1982).

During the pendency of Petitioner's direct appeal, Arango joined with numerous other death row

inmates in filing an application for extraordinary relief and petition for habeas corpus based on the allegation that the Florida Supreme Court had a practice of reviewing ex parte, non-record information concerning capital defendants, mental health and personal background. The Supreme Court of Florida denied relief, Brown v. Wainwright, U.S._____, 102 S.Ct. 542 (1981).[1]

Governor Graham signed Arango's death warrant on April 6, 1983. Pursuant to this warrant, the execution was to be scheduled "some day of the week beginning

noon, Friday, the 29th day of April, 1983, and ending noon, Friday, the 6th day of May, 1983...."

On April 27, 1983, a Petition for Writ of Habeas Corpus, Application for Stay of Execution and Motion for Continuance was filed on behalf of Arango in the United States District Court, Southern District of Florida.[2] This Court immediately held a hearing. Counsel for Arango indicated to this Court that although the execution is scheduled for 7:00 a.m., May 3, 1983, the Superintendent of Prisons has the

authority to execute Arango at any time subsequent to April 29, 1983. Counsel further indicated that an application for stay of execution was denied by the Florida Supreme Court.

Because of this Court's concern over the possibility of the Superintendent of Prisons exercising his authority before all the issues in this Petition could be addressed, this Court granted the application for stay of execution until 6:59 a.m., May 3, 1983. This stay was in no way intended to interfere with any pending state court matters

and to this Court's knowledge it does not. However, this Court further indicated that, if it becomes necessary, upon the filing of any additional petition for writ of habeas corpus subsequent to oral argument before the Florida Supreme Court on May 2, 1983, an immediate hearing would be convened.

On April 30, 1983, this Court conducted a full hearing on all the issues raised in Arango's Petition for Writ of Habeas Corpus including an evidentiary hearing on the issue that has come to be known as the Ford v. Strickland issue, infra, (see also Brown v.

Wainwright, supra). All the issues that were presented to this Court for review had been presented to the Florida Supreme Court either on direct appeal or by petition for writ of habeas corpus. Therefore, this Court found and the State stipulated, that Arango had exhausted all of his state court remedies for the purpose of the present petition for writ of habeas corpus and regardless of the petition for writ of habeas corpus and appeal pending before the Florida Supreme Court, this Court was not presented with a mixed habeas corpus petition. See Rose v. Lundy, _____U.S._____, 102 S.Ct. 1198 (1982).

As heretofore noted, this Court finds no merit to Arango's Petition. Arango raised basically six (6) constitutional errors in the State court. These alleged constitutional errors were fully and fairly reviewed by this Court and found to contain no merit.

II. ANALYSIS

A.) THE BROWN ISSUE: NON-RECORD MATERIAL BEFORE THE FLORIDA SUPREME COURT

Arango raised as the first ground of this Petition that his constitutional rights were violated when the Florida Supreme Court requested, received and reviewed information

which was not part of the trial record or the record on appeal of his case or the cases of his fellow death row inmates. In regard to this contention, Arango requested this Court to conduct an evidentiary hearing. Over the objection of the Attorney General, this Court granted the evidentiary hearing and the exhibits attached to Arango's Petition for Writ of Habeas Corpus were accepted into evidence. These exhibits consist of the Petition for Writ of Habeas Corpus in Brown v. Wainwright and other various exhibits such as the appendices to the Petition and other exhibits referencing the

Clerk of the Florida Supreme Court's requesting and receiving non-record material.

Arango next requested to take the testimony of the Clerk and staff of the Florida Supreme Court regarding two areas: (1) the possibility that the requested records had not been destroyed as asserted in the Brown petition and (2) whether with regard to Arango a request for non-record material was made regardless of no material being received. The Court denied the above request.

As to whether the requested records had been destroyed, the

Court notes that Arango was a member of that group of prisoners who originally joined Brown in challenging the constitutionality of their sentences to death. On page three (3) of that original petition the last paragraph of Section III - FACTUAL BASIS FOR RELIEF - it is stated:

> Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it as alleged in the preceeding paragraph and receiving it as alleged in the preceeding paragraph, has at the Court's direction been destroyed or purged from this Court's files. As a result, it is no longer possible for petitioners

to identify all of the cases in which such information was requested or received.

In addition, Petitioner's counsel admitted that no evidence exists to indicate that such records had not been destroyed as alleged.

Therefore, such a request belies the allegation made in the petition wherein the petitioner not only acknowledges that the documents were destroyed but actually alleges it.

The second area concerns whether the Clerk of the Supreme Court in fact requested non-record

information. As with the first area, the Court finds such an inquiry irrelevant.

Arango claimed that the mere request of such information regardless of whether the Florida Supreme Court actually relied upon the non-record information creates the appearance of impropriety and that in capital cases where the petitioner's life is at stake, federal law guarantees petitioner a full and fair review of his death sentence free from even the appearance of impropriety. Arango contended that his fundamental right of due process of law was abridged because under the circumstances the avail-

ability to the Court of prejudicial material creates an appearance of impropriety thereby tainting the the entire pool of defendants in Brown v. Wainwright and specifically him.

The Court finds that the above analysis defies logic. During the evidentiary hearing the following dates were proffered to the Court and accepted as accurate by Petitioner: on September 2, 1980, Arango filed his Notice of Appeal to the Florida Supreme Court on his direct appeal. The Court does not believe that the mere filing of that Notice of Appeal alerted

the Justices of the Florida Supreme Court to the nature of that appeal. Twenty seven days later on September 29, 1980, the Petition for Writ of Habeas Corpus was filed in Brown v. Wainwright. On January 12, 1981, the Attorney General's office received the record on Arango's direct appeal and on or about that date, the Florida Supreme Court received it. Three days later on January 15, 1981, the Florida Supreme Court decided Brown v. Wainwright, 392 So.2d 1327 (1981).

As noted by the Eleventh Circuit in Ford v. Strickland, 696 F.2d 804 (1983), the Florida Supreme Court held in Brown that

state law does not permit the use of non-record material in the appellate review of a capital sentence. Id. at 810. The Eleventh Circuit Court of Appeals then quoted the following passage from Brown:

> [A]s a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence... .
>
> * * *
>
> The record of each proceeding, and precedent, necessarily frame our determinations in sentence review.... Factors or information outside the record play no

part in our sentence review role.

Brown v. Wainwright, 192 So.2d at 1331-1332.

On March 3, 1981, Arango filed his appellate briefs in the direct appeal and the Attorney General of the State of Florida responded on May 18, 1981. Oral argument took place on August 31, 1981. The Florida Supreme Court decided Arango's direct appeal on January 31, 1982, more than a year after the Brown decision.

At the time the Court considered Arango's appeal, the Brown case had already been decided. This Court must assume that the Florida State Supreme Court followed Brown and

did not review non-record information in Arango's case. In this case, not only does it appear by virtue of the dates at issue that the material was not viewed in Arango, but there has been no indication that any non-record information existed as to Arango. The exhibit offered by Petitioner in evidence clearly states that none existed.

This brings the Court to the issue of whether by merely requesting and receiving the information referred to in Brown, supra, relating to other defendants, an appearance of impropriety was

created tainting the entire pool of defendants in Brown v. Wainwright and particularly the Petitioner in perpetuity.

In light of the statement in Brown, supra, that view of non-record information would be totally irrelevant to the Court's role in sentence review, and the further indication by the Florida Supreme Court that such information was used for some other purpose, Brown v. Wainwright, 392 So.2d 1327, 1333 n. 17 (1981), the Court cannot find any merit with this second contention.

As to the Ford v. Strickland, issue (Brown v. Wainwright in the Florida Supreme Court), the following findings of fact and conclusions of law based on the record before this Court are made:

1. That, on September 29, 1980, the date of the original application for emergency releif and petition for habeas corpus which has come to be known as Brown v. Wainwright and in which the Petitioner was a named Petitioner represented by counsel, said application clearly reflected that whatever material is referred to in Brown v. Wainwright had in fact already been destroyed by the Clerk of the Supreme Court of Florida.

2. That none of the material regardless of when destroyed contained information pertaining to the Petitioner Arango.

3. That the first occasion that the Petitioner sought direct appellate review of his capital conviction in the Supreme Court of Florida was on September 2, 1980, only twenty seven days prior to the filing of the original application and petition for habeas corpus in Brown v. Wainwright (which the Court already notes cont ained an allegation by the Petitioner that the material complained of had already been destroyed).

4. That the record on the direct appeal of the Petitioner was filed with the Florida Supreme Court on or about January 12, 1981.

5. That on January 15, 1981, the Court issued its opinion in Brown v. Wainwright in which it is affirmatively stated by the Court that such material was not used as asserted in the original application and petition for writ of habeas corpus.

6. That Arango's appellate brief in the direct appeal was filed with the Court on March 3, 1981 and the State's response thereto on May 18, 1981.

7. That oral argument on Petitioner's direct appeal was on August 31, 1981 and the opinion and decision of the Florida Supreme Court affirming his capital conviction issued on January 21, 1982.

8. That the sole material offered at the evidentiary hearing was the exhibit of the Brown v. Wainwright proceeding and the date that each of the appellate functions occurred regarding the direct appeal which dates have been stipulated to by the parties as accurate. In addition, as alluded to earlier, the Petitioner requested the opportunity of deposing the Clerk of the Florida

Supreme Court or his staff for the sole purpose of determining two issues: (1) whether or not in fact such material had been destroyed (this request was denied because it belies the very allegations of the petition in the original application in Brown v. Wainwright, supra); and (2) whether or not any material had ever been requested by the Clerk pertaining to the Petitioner Arango although the record clearly reflects that no such material was ever received (this the Court considered then and considers now insofar as this Court's determination to be immaterial).

9. Although this Court did not consider an evidentiary hearing essential to a determination of the issue framed in Ford v. Strickland (Brown v. Wainwright), in an abundance of caution, this Court granted such evidentiary hearing. Based upon the aforesaid findings of fact which are uncontradicted in the record, the reasons for denial of said relief on this ground are stronger than before.

10. That this Court takes judicial notice of the fact that the mere filing of a notice of appeal or a record on appeal absent a contrary showing, does not evidence any

awareness or knowledge on the part of Justices of the Supreme Court of Florida as to the nature of the issues framed or the contents of said record on appeal prior to the same being presented by way of briefs or oral argument.

11. That the existence of said material as it pertains to the Petitioner and his direct appeal could have at best existed for a period of twenty seven days (September 29, 1980, date of original application; September 2, 1980, date of original notice of appeal on direct appeal).

12. That there is no evidence whatsoever to establish that whatever materials were before the Supreme Court of Florida in any form or fashion affected the decision of the Supreme Court of Florida in affirming the Petitioner's appeal one year and six days after the filing of their opinion in Brown v. Wainwright (January 15, 1981, Brown v. Wainwright opinion; January 21, 1982, affirmance opinion in direct appeal at Arango's conviction.)

13. This record is totally devoid of any facts of whatsoever kind or nature which would indicate that

there was an appearance of impropriety as pertains to said Petitioner and the handling of his direct appeal by the Florida Supreme Court. This Court finds as a matter of fact and law that no such appearance existed nor was his direct appeal in any way tainted by the assertions and allegations made in the case of Brown v. Wainwright.

14. This Court specifically finds against the assertion by the Petitioner that there should be an inference drawn that since such material was in some form or fashion before the Supreme Court of Florida as pertains to other Defendants, that the Court should not only disregard the opinion of the Florida Supreme Court as pertains to

such other defendants but in some way should draw the conclusion that this Petitioner on his direct appeal was deprived of due process of law in a full and fair consideration of his appeal by that Court. This Court does specifically find that the assertion made by said Court in their opinion in Brown v. Wainwright would certainly hold true and should be afforded due consideration by way of that Court subsequently deciding the appeal of an individual appellant over a year later in which no material of any kind pertaining to said petitioner was ever before said Court.[3]

Based upon the above and foregoing findings of fact and conclusions of law, the Court finds as a matter of law that the stay heretofore issued by Justice Powell of the United States Supreme Court on April 15, 1983 pertaining to the mandate in Ford v. Strickland has no application to the facts of this case and to the Petitioner herein.

B. THE WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), VIOLATION

Arango contends "that he was denied his right to a fair trial by an impartial jury drawn from a cross-section of the community when one of the venire members, Mr. Alvarez, was

excused for cause in violation of the precepts of Witherspoon v. Illinois, 391 U.S. 510 (1968)."

In Witherspoon, the Court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522.

In Adams v. Texas, 448 U.S. 38 (1980), the Court discussed a line of cases that established the following general proposition:

> That a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his oath. The State may insist, however, that jurours will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45.

> Moreover, the law is clear that a state has the power to:
>
> [e]xecute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial

> of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Darden v. Wainwright, 699 F.2d 1031, 1037 (11th Cir. 1983), quoting Adams v. Texas, 448 U.S. 38, 44 (1980), quoting Witherspoon v. Illinois, 391 U.S. at 522-23, n. 21 (1968).

In deciding this issue, the Court finds it necessary to examine the entire voir dire examination.[4] Darden v. Wainwright, 699 F.2d 1031, 1038 (11th Cir. 1983). Based on this Court's review of the entire voir dire examination of Mr. Alvarez, it appeared that although Mr. Alvarez seemed unsure about what was being

asked of him, the ultimate conclusion to ge drawn from the examination is that his attitude toward the death penalty would interfere with his making an impartial decision as to Arango's guilt. Moreover, in this Court's opinion such a determination is "unmistakably clear", Darden v. Wainwright, 699 F.2d 1031, 1037 (11th Cir. 1983), and therefore, Mr. Alvarez' ability to perform his duties as a juror were substantially impaired.

C. JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFTED TO ARANGO THE BURDEN OF PROVING THAT THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES.

Arango alleges as his third

ground that "the instructions to the jury at the penalty phase unconstitutionally shifted to Mr. Arango the burden of proving that the mitigating circumstances outweighed the aggravating circumstances, thus violating his rights to due process of law and to be free from cruel and unusual punishment under the Fifth, Eighty and Fourteenth Admendments to the United States Constitution."

Upon examining the entire instruction, the Court notes that the trial court gave the Florida Standard Jury instruction. Appendix A at 941-945. However, in addition

to the Florida Standard Jury Instructions, the trial court gave an additional instruction which made it clear that the jury must find that the aggravating circumstances outweigh the mitigating circumstances. Appendix A at 945-946.[5] Examining this instruction as a whole, the Court does not believe that the burden of proof was shifted to Arango in violation of his constitutional rights and so finds as a matter of fact and law.

D. (1) THE TRIAL COURT ERRED IN ADMITTING TESTIMONY FROM THE MEDICAL EXAMINER ALLEGED TO BE IRRELEVANT, PREJUDICIAL AND INFLAMMATORY

As a fourth ground of the Petition for Habeas Corpus, Arango alleged that during the sentencing phase of the proceedings "highly irrelevant, prejudicial and inflammatory testimony from the Medical Examiner regarding his personal opinions of the feelings experienced by the dying victim" were presented to the jury. Petitioner asserts that the presentation of such testimony was violative of his right to a fair trial and to due process of law as provided in the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner further claims that the imposition of the death sentence in light of

the testimony of the Medical Examiner would be violative of his Eighth Amendmennt right against cruel and unusual punishment. The Court finds that this claim raised by Arango is not cognizable in a federal habeas corpus proceeding. Whether the Medical Examiner's testimony was "irrelevant, prejudicial and inflammatory" is a state evidentiary question and beyond the scope of review by Federal Court in considering the issue on a habeas petition. It is settled law that a Federal Court may not review the trial judge's action concerning the admission of evidence. Lisenba

v. California, 314 U.S. 219, 228 (1971); Woods v. Estelle, 547 F.2d 269 (5th Cir. 1977); Pleas v. Wainwright, 441 F.2d 56 (5th Cir. 1971). As the Supreme Court has stated:

> We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence .... The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason above, render its reception a violation of due process.

Lisenba, 314 U.S. at 228-9.

The Fifth Circuit states that the mere violation of evidentiary rules does not itself invoke habeas corpus review. The Court must examine the record only to determine whether the error was of such magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause. In analyzing "fundamental fairness" the erroneous admission of prejudicial evidence can justify habeas corpus relief if it is material in the sense of a crucial, critical and highly significant factor. Woods v. Estelle, 547 F.2d 269, 271 (5th Cir. 1977).

The Court's examination of the record leads it to conclude that if any error was committed in the admission of the Medical Examiner's testimony, it was harmless. From a reading of the testimony presented at trial, it is clear that the Doctor's opinions were based on scientific analysis and any reference he made to his personal experience served only to simplify his medical findings for the jury.

D(2). THE TRIAL COURT'S INSTRUCTION OF "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCES WAS VAGUE, INCOMPLETE AND FAILED TO ADEQUATELY CHANNEL THE JURY'S DISCRETION

Additionally, as to ground four of the Petition, Arango charges that the trial court's instruction defining the terms "especially heinous, atrocious or cruel" was inadequate in that it was vague and incomplete and that the Petitioner's requested instructions were refused.

The record indicates that the trial Court instructed the jury on Section 921.141(5)(h), Florida Statutes (1982). The trial Court instructed the jury that "[h]einous means extremely wicked or shockingly evil. Atrocious means outrageous, wicked and vile [and] cruel means designed to inflict a high degree

of pain; utter indifference to, or enjoyment of the suffering of others; pitiless." Appendix A at 943. This Section of the Statute was construed by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1975). The Court said that:

> [W]hile it is arguable "that all killings are atrocious ...[s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So.2d at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d at

> 9. See also Alford v. State, 307 So.2d 433, 445 (1975); Halliwell v. State, supra, at 561. We cannot say that the provision, as construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Id. at 255-56.

Although Petitioner asserts that he requested a jury instruction as to the aggravating circumstance of "especially heinous, atrocious or cruel", Petitioner did not submit any such instructions to this Court as an exhibit, nor did any reference to the same in the trail transcript indicate that any instructions were actually requested by Arango as to

what is heinous, atrocious or cruel.

This Court finds that in light of the trial court's defining each term individually and in light of Proffitt, the instruction was neither vague, incomplete nor inadequate.

E. THE DEATH SENTENCE IMPOSED ON THE PETITIONER IS A CRUEL AND UNUSUAL PUNISHMENT AND IS "TOO GREAT"

Arango asserts as a fifth ground of his Petition that the death sentence imposed upon him is a cruel and unusual punishment in light of all the relevenat facts and it thereby contravenes the requirement of proportionality. Counsel for Petitioner

Spinkellink v. Wainwright, 578 F.2d 582, 606 (5th Cir. 1978). The record supports a finding that the trial court found the existence of an aggravating circumstance that the crime was "especially heinous, atrocious or cruel", Section 921.141 (5)(h), Florida Statutes (1982), Appendix A at 952-3, Appendix B at 149-150, so as to merit the penalty of death. Although the trial court found one of the statutory mitigating circumstances, Arango's lack of prior criminal activity, Section 921.141(6) (a), Florida Statutes (1982), the record establishes that this single circumstance was outweighed by the

requested of the Court an evidentiary hearing on the issue of whether the death penalty under Section 921.141, Florida Statutes (1982), is being applied arbitrarily and capriciously as well as disproportionately in violation of Petitioner's rights under the Eight and Fourteenth Amendments. The Court finds that such an evidentiary hearing is wholly without merit in a federal habeas petition as the standard of review by this Court is merely to determine whether the trial court and the Florida Supreme Court performed their duty of sentencing Arango under Section 921.141 with care and concern.

aggravating circumstances within the meaning of the statute. Appendix A at 951-953 and Appendix B at 149-150. In weighing aggravating and mitigating circumstances the Florida Supreme Court has repeatedly stated that the death penalty statute does not contemplate a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. Instead, it places on the judge the task of weighing all the factors to determine whether the death sentence is appropriate. Arango v. State, 411 So.2d 172 (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981); Hargrave v. State, 366 So.2d 1 (Fla. 1978).

The Florida death penalty has been held constitutional in that it outlines standards in the form of aggravating and mitigating circumstances concerning the nature of the crime, as well as the nature of the criminal, which judges and juries are to follow in exercising their discretion as to which convicted murderers are to die for their crimes and which are to receive life sentences. Proffitt v. Florida, 428 U.S. 242 (1975); see also State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974) (Section 921.141 held constitutional by Florida Supreme Court). In Proffitt, the Supreme Court said:

> [I]n Florida ... it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." [And therefore], [on]n its face the Florida system thus satisfies the constitutional deficiencies identified in Furman v. Georgia, 408 U.S. 238 (1972).

Proffit v. Florida, 242 U.S. at 253.

The Fifth and Eleventh Circuits state that the federal courts' inquiry of a state court's sentencing procedure need not and should not entail a case-by-case comparison of the facts in a given case with the decisions of the state court in other death penalty cases. Spinkellink v. Wainwright,

578 F.2d at 606; Ford v. Strickland, 696 F.2d at 819. To provide otherwise, would allow a federal court to quarrel with the state court on its interpretation of the state's statutes. Petitioner has shown no basis for this Court to conclude that the Florida Supreme Court has failed to discharge its statutory duties responsibly and, therefore, this Court finds that the state courts acted through a properly drawn statute with appropriate standards to guide discretion and such discretion was accomplished with care and concern.

F. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE AT TRIAL WHICH HAD BEEN OBTAINED AS THE RESULT OF AN UNLAWFUL, WARRANTLESS ENTRY INTO PETITIONER'S APARTMENT

Petitioner's final assertion is that the search of his apartment and the seizure of evidence therein by the arresting police officers violated his Fourth Amendment rights.

In Stone v. Powell, 428 U.S. 465 (1976), the Supreme Court limited the scope of federal court review of such a Fourth Amendment issue on a habeas corpus petition filed by a state prisoner. The inquiry before this Court is limited to a finding of whether or not Arango was afforded

an opportunity to fully and fairly litigate his claim in state court. Id. at 494. Counsel for Petitioner has represented to this Court, and the record indicates, that this identical issue was fully and fairly litigated during the state proceeding in a motion to suppress hearing by the Florida Supreme Court and affirmance of that ruling. Appendix A at 365-401. Given this representation and mindful of the dictates of the Stone case, the Court inquired of Arango's counsel why he should not be precluded from raising the issue before this Court. Counsel responded that the rule of Stone v. Powell could

be circumvented upon a finding of exigent circumstances or fundamental error.

The Court has been directed to no authority to support this contention. However, in this Court's opinion, no circumstances exist here to warrant circumventing the dictates of Stone and no fundamental error exists.

Based upon the above and foregoing and the Court's determination adverse to the Petitioner's position as set forth in this Memorandum Opinion, it is ORDERED AND ADJUDGED as follows:

1. That this Court has jurisdiction over the parties and the subject matter as pertains to the issues heretofore referred to in this Court's Opinion on the grounds that as to each of said issues the Petitioner has exhausted his state remedies.

2. That this Court finds as a matter of law that as to each of the grounds asserted for the issuance of this Court's "Great Writ of Habeas Corpus" that the same are without merit based upon this Memorandum Opinion which this Court's findings of fact and conclusions of law.

/

3. That the Petition for issuance of this Court's "Great Writ of Habeas Corpus" be and the same is hereby DENIED and this cause be and the same is hereby dismissed with prejudice.

4. That in view of the notification to this Court by the Honorable Sid White, Clerk of the Supreme Court of Florida, that that Court has issued a stay of execution staying the Governor's warrant for imposition of the death penalty as pertains to the Petitioner issued April 6, 1983, the requested stay of execution is now moot; however, based solely on the record before it and the issues

presented as set forth in this Memorandum Opinion this Court would not issue a stay of execution.

DONE AND ORDERED in Chambers, at Miami, Florida this 6 day of May, 1983.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Sharon B. Jacobs, Esq.
Penny Brill, Esq.

FOOTNOTES BY THE COURT

[1]Although it is not before this Court, it should be noted that Arango filed a motion for post-conviction relief in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, pursuant to Fla.R. Crim.P. 3.850. Arango has appealed to the denial of his motion for post-conviction relief and has filed a petition for writ of habeas corpus in the Florida Supreme Court. Oral argument has been scheduled for the appeal and the petition for May 2, 1983 at 9:30 a.m. Of course, the issues raised in the motion for post-conviction relief and the petition for writ of habeas corpus now pending oral argument before the Florida Supreme Court are not the subject of the Petition for Writ of Habeas Corpus at issue before this Court to which this opinion directs itself.

[2]This Court conducted an emergency hearing on April 27, 1983. At that time, the Court requested the parties to provide it with a complete record of all proceedings relevant to the issues before it. Subsequent to that time, the Attorney General's office delivered to this Court the entire record of transcripts on appeal.

This record contained the following exhibits: A, part I, II and III, B, C, D, E, F, G, H, I, J, K, L and M hereinafter Appendix A, B., etc. at ____. The Court also received from the Attorney General's office a response to the Petitioner's Petition for Writ of Habeas Corpus.

[3]The Court notes that in Booker v. Wainwright, Case No. 82-5468, Slip Op. 2633 (11th Cir., April 25, 1983), the Eleventh Circuit Court of Appeals rejected Petitioner's contention that the Florida Supreme Court's solicitation of ex parte psychological material concerning Petitioner was unconstitutional. The Court citing Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc) indicated that "Booker's attorney was furnished with the Florida Supreme Court's request of Booker's presentence investigation report, thus rendering this factual situation weaker than Ford." Booker, supra, at 2644. This Court notes that Arango's case appears even weaker than Booker's case, there being no indication that any nonrecord information whatsoever was furnished to the Florida Supreme Court.

[4]Mr. Alvarez' voir dire examination appears at Appendix A at 15-17, and again at 97-105.

[5]The entire instruction given by the trial court with regard to this aspect of the case appears at Appendix A at 941-947.

Luis Carlos ARANGO, a/k/a Carlos Luis Arango, Florida Inmate No. 075042, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 83-5421.

United States Court of Appeals, Eleventh Circuit.

Sept. 23, 1983.

State death-row prisoner appealed from a decision of the United States District Court for the Southern District Court of Florida, Eugene P. Spellman, J., 563 F. Supp. 1181, denying his

petition for writ of habeas corpus. The Court of Appeals held that in interests of judicial economy, federal habeas corpus proceeding would be held in abeyance until all of claims petitioner wanted to assert were exhausted and brought before federal court.

Vacated and remanded.

Habeas Corpus 45.3(1)

In interests of judicial economy, federal habeas corpus proceeding would be held in abeyance until all of claims petitioner wanted to assert were exhausted and brought before federal court where petitioner had not waived

claims being simultaneously asserted in state court, state court proceeding could potentially moot federal proceeding, past experience in death cases indicated that if relief was denied in state court, petitioner would assert those claims in successive petition in federal court and would probably incorporate some of claims which were subject of pending petition, and there was no time limitation within which successive petition would have to be filed.

Appeal from the United States District Court for the Southern District of Florida

Before RONEY, FAY and ANDERSON, Circuit Judges.

BY THE COURT:

This is an appeal from the denial, 563 F.Supp. 1181, of a petition for writ of habeas corpus filed on behalf of Petitioner, Luis Carlos Arango, pursuant to 28 U.S.C.A. § 2254, which petition asserts six grounds for constitutional error in Arango's conviction for murder and sentence to death.[1]

1. (1) wrongful exclusion of prospective juror who did not make it unmistakably clear

(Footnote 1 continued)

he would vote against the death penalty regardless of the facts (Witherspoon);

(2) the unconsitutional shifting of the burden of persuasion to Petitioner in the trial court's instructions to the sentencing jury on the question of whether mitigating circumstances outweighed aggravating circumstances;

(3) wrongful admission of expert testimony introduced to establish tat the crime was "especially heinous, atrocious, or cruel";

(4) the imposition of a disproportionate penalty;

(5) the Florida Supreme Court's ex partie review of nonrecord information in capital appellants' case (the Brown issue); and

(6) his sentence is deprived of legitimacy because of the public's perception of the apparent impropriety of the Florida Supreme Court review of nonrecord information in certain capital cases.

After this case was scheduled for oral argument, it came to the Court's attention that Petitioner is pursuing in state court other claims attacking the constitutionality of his conviction and sentence. The Supreme Court of Florida has decided eight of these claims against him.[2] Arango v. State and Arango v. Wainwright, Case Nos. 63,562; 63,563, ___So.2d___ (Fla. Sept. 1, 1983. The Florida court remanded the case to the state trial court for an evidentiary hearing on an alleged Brady violation.

2. Petitioner urged that he received ineffective assistance of counsel on direct appeal and,

(Footnote 2 continued)

in support, cited nine issues which his counsel failed to raise on appeal. Listed below are the eight issues the court found to be without merit.

(1) denial of Petitioner's motions for mistrail and to voir dire a juror because the judge and juror smiled during Petitioner's testimony;

(2) refusal of judge to permit introduction of newspaper clippings in mitigation showing that murder victim was notorious Mafia figure;

(3) improper consideration of a non-statutory aggravating factor not supported by evidence.

(4) indictment violated sixth amendment and due process clause of the fourteenth amendment by not including aggravating factors to be considered;

(5) the Florida death penalty statute, facially and as applied, violates the fifth, sixth, eighth, and fourteenth amendments by failing to channel jury discretion

(Footnote 2 continued)

and by permitting irrelevant factors into the sentencing process by jury and judge;

(6) the death sentence violated the sixth, eighth, and fourteenth amendments in that incorrect jury instructions were given and correct jury instructions were refused;

(7) imposition of the death sentence after Petitioner rejected a plea bargain offer of life imprisonment violated the sixth, eighth, and fourteenth amendments;

(8) Petitioner's due process rights to a fair and impartial jury was violated in that the jury which recommended the death penalty was composed of jurors who favored the death penalty and who had already rejected his trial defenses as to guilt and formed an unfair and prejudicial mindset.

Prior to the Florida Supreme Court's decision, none of these claims could have properly been considered by a federal court because Petitioner had not exhausted his state remedies. 28 U.S.C.A. §§ 2254(b),(c). The Brady claim still pending in the state court could not be presented at this time to the federal court. If the unexhausted claims had been alleged, the district court, would have been required to dismiss the petition containing both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982).

Under Rose, the Petitioner then could have amended to present only exhausted claims, or returned to the state court for exhaustion prior to bringing the federal petition. The failure to include unexhausted claims could, however, cause the Petitioner to lose the opportunity to litigate in the future the unexhausted claims. 455 U.S. at 520, 102 S.Ct. at 1204.

This Court knows certain things: (1) Petitioner has not waived the claims being asserted in state court; (2) the state court proceeding could potentially moot this federal proceeding; (3) past experience in

death cases indicates that if relief is denied in the state court, Petitioner will assert those claims in a successive petition in federal court and will probably incorporate some of the claims here asserted; (4) there is no time within which such a successive petition would have to be filed, so that what is being done on this appeal might require reconsideration on a second petition.

In the interests of judicial economy, this federal proceeding should be held in abeyance until all of the claims Petitioner wants to assert are exhausted and brought

before a federal court. In order to avoid the repetition and delays that can occur in these proceedings, the Court enters the following order:

The judgment of the district court is hereby VACATED and the case is REMANDED to the district court to be held in abeyance until the exhaustion of the claims asserted in the present state proceedings.

The Petitioner is given 10 days after the claims presently pending in state court have been exhausted within which to move to dismiss this case as moot or to amend his petition to include all claims he wishes to raise before the federal courts.

The district court shall expeditiously conduct such proceedings as may be appropriate on these other issues, and supplement its prior order to include a decision on all claims presented not heretofore decided.

Upon the entry of a final judgment in the district court, either party may promptly pursue an appeal to this Court. The appeal shall be expedited. The parties shall file supplemental briefs only, the present briefs to be used on all issues presently pending before this Court.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-1077-Civ-EPS

LUIS CARLOS ARANGO a/k/a
CARLOS LUIS ARANGO,
Florida Inmate No. 075042,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent.

_____/

ORDER

THIS CAUSE is before the Court on Petition For Writ of Habeas Corpus, Application For Stay of Execution and Motion For Continuance along with supporting memorandums of law and exhibits filed on behalf

of Petitioner, LUIS CARLOS ARANGO a/k/a CARLOS LUIS ARANGO. Having conducted an emergency hearing on the above Motions at 7:00 p.m., Wednesday, April 27, 1983 and having reviewed the record and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED as follows:

1.) The Office of the Attorney General of the State of Florida shall respond to the above Motions by 12:00 Noon, Friday, April 29, 1983. The Attorney General's response shall be accompanied by a complete record of all the relevant state court proceedings.

2.) The Motion For Continuance is DENIED.

3.) A hearing on the issues framed in the Petition For Writ of Habeas Corpus is hereby set for 9:30 a.m., Saturday, April 30, 1983.

4.) A Stay of Execution is GRANTED until 6:59 a.m., Tuesday, May 3, 1983, only with regard to the issues in this petition.

5.) At the present time there are several issues pending before the Supreme Court of Florida. These issues are set for argument at 9:00 a.m. Monday, May 2, 1983. Subsequent to petitioner exhausting his state court remedies and filing the appropriate petition For Writ

Of Habeas Corpus as to these issues, this Court will conduct a hearing. Said hearing is tentatively scheduled for 2:00 p.m., Monday, May 2, 1983.

DONE AND ORDERED this 29 day of April, 1983.

/s/ Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

cc: Sharon B. Jacobs, Esq.,
Steven E. Chaykin, Esq.,
Penny Brill, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-1077-CIV-EPS

LUIS CARLOS ARANGO a/k/a
CARLOS LUIS ARANGO,
Florida Inmate No. 075042,

Petitioner,

v.

LOUIS L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

_____/

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS SUBJECT TO MEMORANDUM OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW HEREINAFTER TO BE FILED

THIS CAUSE came before the Court on the Petition for Habeas Corpus filed by the Petitioner herein challenging his first degree murder conviction and the imposition

of the death penalty. The facts pertaining to this matter will be hereinafter more fully set forth in this Court's Memorandum Opinion to be filed with the Clerk of this Court which will likewise constitute this Court's Final Order in the above-styled cause.

For the purposes of this Order, it should be noted that this Petition for Habeas Corpus was filed at a time when the Governor of this State had issued his warrant for the imposition of the death sentence against the above-named Petitioner during the week beginning at noon, April 29, 1983 and ending at noon, May 6, 1983

which Petition asserted numerous constitutional grounds which have been fully exhausted and which are more fully set forth in the aforesaid Memorandum Opinion.

As a result of the urgency of this matter, this Court issued a stay preventing imposition of the death penalty prior to the date upon which it had been set, to-wit: 7:00 a.m., May 3, 1983 and conducted a full hearing on April 30, 1983 for a period of several hours, part of which included a brief evidentiary hearing.

This Court had urgently attempted to meet the aforesaid deadline of preparing and filing

its Memorandum Opinion based on its conclusions that the Petition for the Great Writ of Habeas Corpus was totally without merit so that the Petitioner would have the opportunity of seeking appellate review and possible subsequent stay of execution before either the Eleventh Circuit Court of Appeals or the United States Supreme Court. During the course of preparation of said Memorandum Opinion denying relief, this Court was informed by the Clerk of the Supreme Court of Florida that a stay had been entered of Petitioner's execution based on post-trial and post-appellate proceedings then pending

before said Florida Supreme Court obviating the necessity and need for the filing of said Opinion prior to 7:00 a.m., May 3, 1983.

Based upon the above and foregoing and the Court's determination adverse to the Petitioner's position as set forth in the Memorandum Opinion hereinafter to be filed, it is ORDERED AND ADJUDGED as follows:

1. That this Court has jurisdiction over the parties and the subject matter as pertains to the issues heretofore referred to in this Court's Opinion on the grounds that as to each of said

issues the Petitioner has exhausted his state remedies.

2. That this Court finds as a matter of law that as to each of the grounds asserted for the issuance of this Court's "Great Writ of Habeas Corpus" that the same are without merit based upon the said Memorandum Opinion of this Court which this Court will treat in its entirety as this Court's findings of fact and conclusions of law.

3. That the Petition for issuance of this Court's "Great Writ of Habeas Corpus" be and the same is hereby DENIED and upon the filing of this Court's Memorandum Opinion and Order a Final Order of

Dismissal of this cause will be entered.

4. That in view of the notification to this Court by the Honorable Sid White, Clerk of the Supreme Court of Florida, that the Court has issued a stay of execution staying the Governor's Warrant for imposition of the death penalty as pertains to the Petitioner issued April 6, 1983, there is no further need for this Court to act upon said requested stay of execution except that it would be the finding of this Court based solely on the record before it and the issues presented as set forth in the Memorandum Opinion of this Court to

be hereinafter filed, that this Court would not issue a stay of execution; and, being of the opinion that as to each of the issues raised the same are totally without merit, a certificate of probable cause would be and shall hereinafter be denied.

DONE AND ORDERED in Chambers, at Miami, Florida this 2 day of May, 1983.

/s/ Eugene P. Spellman

UNITED STATES DISTRICT JUDGE

Copies to all parties

Luis Carlos ARANGO, a/k/a Carlos Luis Arango, Florida Inmate No. 075042, Petitioner-Appellant.

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 83-5421.

United States Court of Appeals, Eleventh Circuit.

July 31, 1984.

After the Court of Appeals, 716 F.2d 1353, vacated denial of habeas corpus relief by the United States District Court for the Southern District of Florida, Eugene P. Spellman, J., 563 F.Supp. 1181, the state petitioned for rehearing. The Court

of Appeals held that vacation of denial of habeas corpus relief and remand to District Court to wait until collateral claims in state court either rendered federal claims moot or were exhausted so that they could be joined with federal petition if petitioner so desired did not create precedent by which death-sentence petitioners could implement delaying and dilatory tactics.

Petition denied.

Appeal from the United States
District Court for the Southern
District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion September 23, 1983, 11 Cir., 1983, 716 F.2d 1353).

Before RONEY, FAY and ANDERSON, Circuit Judges.

BY THE COURT:

In this case, because of special circumstances known to the Court, we vacated the denial of habeas corpus relief, 563 F.Supp. 1181, and remanded the case to the district court to wait until collateral claims in the

state court either rendered the federal claims moot or were exhausted so that they could be joined with the federal petition, if the petitioner so desired.

[1] The State's petition for rehearing suggests that the action taken in this case creates a precedent by which death sentence petitioners can implement delaying and dilatory tactics inconsistent with the thrust of such decisions as in Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), and Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc).

The decision, in this case should be of little use in accomplishing such a purpose. A stay of execution of the state judgment is not involved in this case. This decision should furnish no authority upon which to base a federal stay of execution while a petitioner exhausts unasserted claims. It does not suggest that a petitioner can pursue exhausted claims and at the same time not waive unasserted, unexhausted claims. Nor does this decision indicate the state somehow loses its opportunity to assert successive petition defenses if known but unasserted claims are later brought to the federal court. It

does not decide whether a federal court could err in dismissing a petition asserting only exhausted claims where the petitioner refuses to waive unasserted claims which are being actively pressed in the state courts. Any time that a district court knows a petitioner is attempting to piecemeal claims to delay ultimate termination of litigation, the law as to the abuse of the writ might well involve first petitions as well as successive petitions. This case does not touch on those issues.

[2] When a district court is presented with a federal habeas corpus petition raising only exhausted claims,

the court is not required to grant a continuance if the petitioner has other claims still pending in state court. Thompson v. Wainwright, 714 F.2d 1495, 1500 (11th Cir. 1983). The court can treat the petition and motion for continuance as, in effect, presenting a mixed petition and dismiss it. See Rose v. Lundy, 455 U.S. 509, 518-19, 102 S.Ct. 1198, 1203-04, 71 L.Ed.2d 379 (1982). In the alternative, the petitioner can waive his right to federal habeas corpus relief on the unexhausted claims.

The law concerning these issues is unaffected by the handling of this case, where a state court has been sufficient merit in an unexhausted

claim to direct an evidentiary hearing, and where no federal stay of execution is involved.

The decision in this case was based on the unusual circumstances of this case, grounded in judicial economy and with full knowledge that a decision on this appeal might not terminate this litigation and might be rendered moot.

The petition for rehearing is DENIED, and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure, Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

Carlos Luis ARANGO, Appellant,

v.

The STATE of Florida, Appellee.

Carlos Luis ARANGO, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
Respondent.

Nos. 63562, 63563.

Supreme Court of Florida,

Sept. 1, 1983.

Petitioner, who was convicted of first-degree murder and sentenced to death sought writ of habeas corpus and stay of his execution pending final disposition of writ. By separate application, he petitioned for stay of execution and extraordinary relief

to remedy alleged violations of Brady and international law. Petitioner also appealed the denial by the Circuit Court, Dade County, Robert M. Deehl, J., of his motion for post-conviction relief. The Supreme Court held that: (1) petitioner was not denied ineffective counsel on direct appeal; (2) State's failure to preserve exculpatory evidence and issues which were either raised, or could have been raised, on appeal did not present issues appropriate for post-conviction relief challenges; (3) post-conviction relief judge did not err in failing to attach portions of files and records

conclusively showing that petitioner was entitled to no relief, since petitioner was granted hearing, and such attachment is required only if no hearing is held; (4) imposition of death penalty would not violate international law; but (5) petitioner was entitlted to hearing on State's failure to make him aware of pistol, which was allegedly exculpatory evidence.

REMANDED.

McDonald, J., concurred specially and filed opinion in which Overton, J., joined.

Adkins, Boyd, Ehrlich, JJ., concur to portions of opinion denying habeas

corpus and affirming denial of the 3.850 motion, but dissent to remanding for hearing on Brady violation.

Sharon B. Jacobs and Steven E. Chaykin of Chaykin, Karland & Jacobs, Coral Gables, for appellant/petitioner.

Jim Smith, Atty. Gen., and Penny Hershoff Brill and Carolyn M. Snurkowski, Asst. Attys. Gen., Miami, for appellee/respondent.

PER CURIAM.

Arango was convicted of first-degree murder and sentenced to death in July, 1980. We affirmed the conviction and sentence on direct appeal. Arango v. State, 411 So.2d 172 (Fla.), cert. denied, 457 U.S. 1140, 102 S.Ct. 2973,

73 L.Ed.2d 1360 (1982). Arango petitions for a writ of habeas corpus on the ground that he was denied effective assistance of counsel on direct appeal and for a stay of his execution pending final disposition of his petition for writ of habeas corpus. By separate application, he petitions for a stay of execution and extraordinary relief to remedy alleged violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and international law. Arango also appeals the denial of his rule 3.850 motion for post-conviction relief. We have jurisidction. Art. V, § 3(b)(7) & (9), Fla. Const. We deny the petition for writ of habeas corpus based on

neffective assistance of counsel and the application for extraordinary relief based on violation of international law, affirm the denial of the rule 3.850 motion, and remand for a hearing on the Brady violation.

HABEAS CORPUS

Petitioner urges that he received ineffective assistance of counsel on direct appeal and, in support, cites nine issues which his counsel failed to raise on appeal:

1. Denial of petitioner's motion to dismiss when state failed to preserve and make available physical evidence which would have proven innocence.

2. Denial of petitioner's motions for mistrial and to voir dire a juror because the judge and juror smiled during petitioner's testimony.

3. Refusal of judge to permit introduction of newspaper clippings in mitigation showing that murder victim was notorious Mafia figure.

4. Impropr consideration of a non-statutory aggravating factor not supported by evidence.

5. Indictment violated sixth amendment and due process clause of the fourteenth amendment by not including aggravating factors to be considered.

6. The Florida death penalty statute, facially and as applied, violates the fifth, sixth, eighth, and fourteenth amendments by failing to channel jury discretion and by permitting irrelevant factors into the sentencing process by jury and judge.

7. The death sentence violated the sixth, eighth, and fourteenth amendments in that incorrect jury instructions were given and correct jury instructions were refused.

8. Imposition of the death sentence after petitioner rejected a plea bargain offer of life imprisonment violated the sixth, eighth, and

fourteenth amendments.

9. Petitioner's due process right to a fair and impartial jury was violated in that the jury which recommended the death penalty was composed of jurors who favored the death penalty and who had already rejected his trial defenses as to guilt and formed an unfair and prejudicial mindset.

We find that all of petitioner's arguments are without merit and that only points 1 and 4 require discussion.

Petitioner contends that he was denied effective assistance of counsel because his lawyer failed to appeal the trial court's denial of his motion

to dismiss based on the state's acknowledged failure to preserve a bloody yellow shirt discovered in petitioner's apartment following the murder. Petitioner's position is that the loss of the shirt by the state constituted a Brady violation and had the shirt been presented at trial, it would have corroborated petitioner's statement that the shirt had been left behind by one of three assailants who petitioner avers murdered the victim.

[1,2] A Brady violation is normally predicated on the defendant's not knowing of the withheld evidence. Where defendant is aware of the

evidence before or during trial, the appropriate action is a motion to compel discovery or a motion to dismiss. Petitioner became aware of the loss of the shirt during trial and moved to dismiss based on its loss. Although there is a possibility that admission of the shirt might have helped the defense, we are not persuaded that failure to raise the issue on appeal constitutes ineffective assistance of counsel. The facts of the case show that the murder occurred in petitioner's apartment, that the shirt was in a bathroom sink, and that there was evidence that petitioner had, at least partially, changed his clothes and

attempted to clean himself prior to the arrival of the police. Under these circumstances, and in view of other evidence that petitioner committed the murder, the trial court's denial of his motion to dismiss predicated upon the state's admitted loss of the shirt is not such that failure to appeal its denial amounts to ineffective counsel.

[3] Petitioner also claims that the trial judge improperly considered a non-statutory aggravating factor which was not supported by any evidence. The basis for this claim is in the trial judge's finding of fact relative to aggravating circumstances.

(H) That the murder of which the defendant has been convicted was especially heinous, atrocious or cruel. That the record amply shows that the defendant did beat the victim, Jario-Arango Posada, with a blunt instrument many times about the head and body, causing deep lacerations and tremendous bleeding; that the victim was struck severely between his legs, almost severing his sexual organ; that the defendant placed televsion remote control wire around the victim's neck

chocking him and balled up a towel and stuffed it into his throat, blocking his air passages; that after severe beating and strangulation, two gunshot wounds were placed in the victim's head. The record further shows that the defendant acted in a premeditated, senseless and cruel manner that is indicative of the unreasonable, unlawful and violent nature of this defendant in the especially heinous, atrocious murder of Jario-Arango Posada.

Petitioner urges that the last sentence of the quote is a separate non-statutory aggravating circumstance bearing on petitioner's conduct prior to the murder and that failure to raise this issue on appeal constituted ineffective assistance of counsel. We disagree. The sentence bears on the judge's finding that the murder was especially heinous, atrocious, or cruel and contains no error. We have previously affirmed the death sentence on direct appeal based on a finding of a single aggravating circumstance, especially heinous, atrocious, or cruel. Arango at 174-75. There was no ineffective assistance of counsel for

failure to raise the issue. See Thomas v. State, 421 So.2d 160 (Fla. 1982).

APPEAL (3.850 MOTION)

[4] Appellant urges that the trial court erred in denying his motion: (1) in the face of uncontradicted evidence that the state failed to preserve exculpatory evidence; (2) in view of the thirteen substantive issues raised by appellant; and (3) without an evidentiary hearing or without attaching the portion of the files and records conclusively showing that appellant was not entitled to relief.

On point one, we have previously noted that the state's failure to preserve the allegedly exculpatory evidence, a bloody yellow shirt, was known to appellant during the course of the trial and that the trial court denied appellant's motion to dismiss based on the state's loss of the evidence.

On point two, the record reflects that all of the thirteen substantive issues raised by appellant were either raised, or could have been raised, on appeal. Thus, neither points one nor two present issues appropriate for rule 3.850 challenges. See Raulerson v. State, 420 So.2d 567 (Fla. 1982).

Point three merits discussion.

On January 3, 1983, appellant's counsel filed an unverified motion for post-conviction relief. Said motion was scheduled for hearing March 9, 1983, but was indefinitely postponed at the request of appellate counsel until she could obtain verification by appellant. The delay in obtaining verification was attributed to a language barrier. (Appellant speaks only Spanish). On April 6, 1983, the Governor signed a warrant directing that appellant be executed during the week of April 29, 1983. Thereafter, appellant's counsel filed an amendment to the motion for post-conviction relief and ancillary

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motions seeking a declaration of indigency, appointment and payment of a translator, experts (attorneys), investigators, and counsel, a stay of the execution, and an evidentiary hearing. Appellant was transported to Dade County and a hearing scheduled for April 21, 1983. On that date, appellant verified his motion for post-conviction relief.

At the rule 3.850 hearing, presided over by the original trial judge, appellant maintained that his ancillary motions should first be granted. The trial judge declined to do so until appellant came forth with preliminary evidence that the claimed ineffective assistance of counsel did

did not result from trial strategy and tactics. Despite the presence at court of the former, allegedly ineffective, counsel, subpoenaed by the state, and contrary to the suggestion of the state and the court, appellant refused to call former counsel and objected to the state doing so. Appellant's position was that he was not prepared for an "evidentiary" hearing on his motion for post-conviction relief and could not prepare for such hearing unless his ancillary motions were granted. Having reached impasse, the trial judge reviewed the standards for post-conviction relief from Knight v. State, 394 So.2d 997 (Fla. 1981), and ruled

that appellant had not supported his motion.

We have reviewed the various points raised by appellant in his motion for post-conviction relief, as amended, and agree with the trial judge that the specific omissions or overt acts are either explainable on their face as trial tactics or do not otherwise show ineffective assistance of counsel. Appellant met the first prong of the four-part test set forth in Knight by detailing the specific omission or overt act on which his claim was based, but failed entirely "to show that this specific omission or overt act was

a substantial and serious deficiency measurably below that of competent counsel." Id. at 1001.

[5] Appellant is apparently laboring under a misapprehension of his burden under Knight and the purpose of a rule 3.850 hearing. When a motion for post-conviction relief is filed, the presiding judge may: (1) determine that the motion itself is legally insufficient and deny the motion without a hearing; (2) determine that the files and records in the case conclusively show that the prisoner is entitled to no relief and deny the motion without a hearing, attaching a copy of the portion of the

files and records conclusively showing no entitlement to relief; or (3) determine that a hearing is required for disposition of the motion.

[6] In the instant cause appellant was afforded a hearing but complains that it was illusory and unduly restrictive because of the judge's refusal to first grant his ancillary motions. Appellant's counsel refused to put on any preliminary evidence to support either the motion for post-conviction relief or the ancillary motions, despite the fact that both the appellant and the allegedly ineffective former counsel were present and available. We approve the trial

judge's determination that preliminary supporting evidence was necessary before he could realistically consider granting the various ancillary motions. The burden was on the appellant to support his pending motions. We, of course, have no opinion as to what the trial judge might have ruled had appellant or appellant's former counsel been called to testify, but the judge cannot be faulted for appellant counsel's tactical decision not to use the hearing to present probative evidence.

[7] We also take this opportunity to comment on what we consider to be the all too frequent, and

questionable practice of waiting until the eleventh hour to raise or prosecute issues which could have and should have been raised months or years before. The unverified motion for post-conviction relief was filed on January 3, 1983. The four-month delay in verifying the motion and scheduling it for hearing until just prior to the scheduled execution week can be described at best as dilatory and, at worst, as an abuse of process. Essentially, appellant appeared at the April 21, 1983, hearing unprepared to carry the Knight burden, demanding instead that he be granted a stay of execution and the appointment of

investigators and experts in the speculative expectation that he might be able at some unknown future date to develop evidence to support the motion for post-conviction relief. We condemn such tactics as unworthy of the legal profession. Spenkelink v. Wainwright, 372 So.2d 927 (Fla. 1979) (Alderman, J., concurring specially).

[8] Appellant also urges that the trial judge erred in failing to attach portions of the files and records conclusively showing that the appellant was entitled to no relief. Such attachment is only required if no hearing is held. Petitioner was granted a hearing.

The motion was denied after the hearing at which petitioner failed to either meet prong two, or three, of Knight or to support his ancillary motions for a stay of the execution and additional time and resources. We have reviewed the transcript of the hearing and find it comports with due process.

APPLICATION FOR EXTRAORDINARY RELIEF

We see no merit in petitioner's argument that imposition of the death penalty on him would violate international law.

[9] At trial, petitioner testified that he and the victim were overpowered by three assailants who

murdered the victim and fled prior to the arrival of the police. Petitioner now urges that he has recently discovered, on approximately April 23, 1983, that a semi-automatic pistol was found on the day following the murder under the balcony of petitioner's apartment, and was turned over to the police investigating the murder. Petitioner urges that this evidence was exculpatory and that the state failed to produce this evidence despite his discovery motion which specifically requested, inter alia:

> 3. Any physical evidence or witness statements which corroborate the Defendant's

statements to Detective Diaz that other Latin males entered the apartment and committed the homicide.

The state acknowledges that it did not make petitioner aware of this evidence but maintains that the pistol was unrelated to this case and, thus, was not disclosed. We express no views on the merits but petitioner has made a prima facie case which requires a hearing. We remand to the trial court for the purposes of conducting a hearing on the claimed Brady violation. (Our stay of execution

granted on May 2, 1983, remains in effect pending the outcome of the hearing.

It is so ordered.

ALDERMAN, C.J. and SHAW, J., concur.

McDONALD, J., concurs specially with an opinion in which OVERTON, J., concurs.

ADKINS, BOYD and EHRLICH, J.J., concur to portions of opinion denying habeas corpus and affirming denial of the 3.850 motion, but dissent to remanding for a hearing on the Brady violation.

McDONALD, Justice, specially concurring.

I concur in all parts of the opinion except that portion that denies an evidentiary hearing on Arango's 3.850 motion. In addition to the relief afforded Arango in the opinion, he should be authorized to present evidence of ineffective assistance of counsel at the sentencing proceeding. In addition, I would go somewhat further because I also feel that he is entitled to an evidentiary hearing on the effectiveness of counsel at the sentencing proceeding. To me this did not appear to be an appropriate

death sentence case, and, had available nonstatutory mitigating circumstances been presented, others may have reached the same conclusion.

OVERTON, J., concurs.

A.130

Luis Carlos ARANGO, Appellant,

v.

STATE of Florida, Appellee.

No. 59678.

Supreme Court of Florida.

Jan. 21, 1982.

Rehearing Denied April 8, 1982.

Affirmed.

McDonald, J., concurred in part, dissented in part, and filed opinion in which Boyd, J., joined.

Vincent J. Flynn of Flynn, Rubio & Tarkoff Miami, for appellant.

Jim Smith, Atty. Gen. and Anthony C. Musto and Joel D. Rosenblatt, Asst. Attys. Gen., Miami, for appellee.

PER CURIAM.

Arango appeals his conviction of murder

in the first degree and possession of a controled substance and his sentence of death. - He alleges that the trial court committed four errors. We find, however, that only three issues raise points that warrant discussion at any length.[1] None of the issues raised require a reversal of the trial court's judgment or sentence. Hence, we affirm appellant's convictions and sentence.[2]

In March of 1980, the Dade County police received a telephone call from the manager of a Miami apartment complex reporting a disturbance. Upon their arrival, the manager reported taht subsequent to telephoning he had heard what he thought was the sound of glass breaking. The police went upstairs and knocked on appellant's apartment door. A neighbor then motioned to them that some kind of activity was occurring at the other end of the apartment. Passing the front window, the officers observed cracked glass on the walkway and what appeared to be a bullet hole in the window. They knocked several times and, after receiving no response, entered through the unlocked kitchen door. ONce inside, they found and detained appellant. A search of the bedroom was then conducted. On the bed lay the body of the deceased, who had an electrical cord wrapped around his neck, multiple lacerations on his face, and two gunshot wounds to his head. Cocaine, pistols, and $7,800 in cash, among other items were seized from the premises.

The grand jury indicted appellant for firs-degree murder and possession of a controled substance. A motion to suppress

evidence allegedly obtained illegally was filed and later denied, the trial judge having determined that the warrantless search was justified under the circumstances.

The jury found appellant guilty of both charges and recommended the death penalty phase of the proceeding, the trial judge found the existence of one aggravating and one mitigating circumstance and imposed the sentence of death.

Appellant first contends that the trial court erred in denying his motion to suppress evidence allegedly obtained by an illegal search and seizure. He relies on Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), which held that the fourth amendment provides protection against a warrantless entry into a person's home for the purpose of making a routine felony arrest. However, the rule in Payton does not apply where there are exigent circumstances. As we have made clear in our decisions, the need to protect life and to prevent serious bodily injury provides justification for an otherwise invalid entry. This exception governs here.

As we recently held in Zeigler v. State, 402 So.2d 365 (Fla. 1981), the police may enter a dwelling without a warrant if they have credible information that a person's life may be in danger. In this case, the police acted under the reasonable belief that a person was either dead or dying inside appellant's apartment. The telephone call and subsequent report from the manager, the cracked glass and bullet hole, and the neighbor's indication of a commo-

tion were sufficient indicia of an emergency situation. Accordingly, no warrant was required, and the motion to dismiss was properly denied.

Appellant next maintains that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof. At one point in the trial proceeding, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) and State v. Dixon, 283 So.2d 1 (Fla.1973) cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

In Mullaney the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In Dixon we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that the state must establish them.

In the present case, the jury instruction, if given alone, may have conflicted with the

principles of law enunciated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existance of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Appellant also argues that the trial court erred in imposing the death penalty. ONe aggravating circumstance was found applicable here: the homicide was considered "especially heinous, atrocious, or cruel." §921.141(6)(a), Fla.Stat. (1979). He maintains that unless we are willing to recede from earlier capital cases construing this statute, his sentence of death is disproportionate punishment. Citing to Halliwell v. State, 323 So.2d 557 (Fla. 1975), Swain v. State, 322 So.2d 485 (Fla. 1975), and Taylor v. State, 294 So.2d 648 (Fla. 1974), he claims that we are compelled to reduce his sentence from death to life imprisonment.

Looking at the facts present here, we see that the cases cited by appellant are clearly distinguishable. In the instant case, the trial judge found that appellant beat the victim with a blunt instrument many times about the head and body. Deep cuts were made on the face, causing severe himorrhaging. The wire used in a TV remote control device was wrapped around the victims's neck, choking him. A large towel stuffed into the victim's mouth prevented

his breathing. After beating and strangling him, appellant shot the victim twice in the head.

Halliwell, on the other hand, involved a love triangle in which the appellant mutilated the body of the deceased several hours after the murder was completed. We reduced Halliwell's sentence from death to life imprisonment, holding that such conduct was not the kind contemplated by the legislature in providing for the consideration of aggravating circumstances. In the present case, the record shows that the beatings occurred prior to the murder, precisely the same factor we held in Halliwell was "relevant in fixing the death penalty." 323 So.2d 561.

Swan is also different because there the trial judge overrode the jury's recommendation of life imprisonment. As we have often stated, such a decision must be based on clear and convincing facts that the death penalty is appripriate. Tedder v. State, 322 So.2d 908 (fla. 1975). The state introduced no evidence showing why Swan should be electrocuted, and the record did not demonstrate facts sufficient to satisy Tedder.

Taylor, like Swan, involved a trial judge's rejection of a jury's recommendation of a life sentence. We reversed the sentence of death, finding that a multiplicity of factors could have influenced the jury to be lenient, including the possibility that the appellant was not the "triggerman" in the murder for which he was charged. In the case before us the jury, in view of only one mitigating circumstances,

recommended death. The trial judge, after considering the totality of circumstances and exercising his reasoned judgment, adopted the jury's advisory sentence.

As we said in Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), the death penalty statute does not contemplate "a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum." Instead it places upon teh trial judge the task of weighing all these factors. We believe that the trial court properly performed this function.

For the reasons expressed, we affirm the convictions and sentence.

It is so ordered.

SUNDBERG, C.J., and ADKINS, OVERTON and ALDERMAN, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion, in which BOYD, J., concurs.

McDONALD, Justice, concurring in part/dissenting in part.

While I concur that there was no trial error, that there was sufficient evidence to sustain the conviction, and that it was the jury's function to believe or disbelieve the defendant, I do not believe that this homicide justifies the death penalty. The trial judge predicates the imposition of the death penalty on the single aggravating factor that the crime was especially

heinous, atrocious and cruel. The facts of this case do not support that finding, as we have defined it in State v. Dixon, 283 So.2d 1 (Fla. 1973), beyond a reasonable doubt. Even if they did, that single aggravating factor should not, in this case, warrant the death penalty. The defendant, a Colombian, has no past criminal record, but was a user of drugs. The deceased, also a Colombian and a friend of the appellant, was a dealer in drugs from whom the defendant had previously purchased drugs. While there is a suspicion that the parties may have been involved in a drug transaction, no one knows why this homicide was committed. Nevertheless, the circumstances sufficient to impose the death penalty. I would reduce the sentence to life imprisonment.

BOYD, Justice, concurs:

I concur in the majority opinion affirming guilt, but I concur with Justice McDonald ipinion that life imprisonment and not death is the appropriate penalty.

FOOTNOTES BY THE COURT

[1] Arango also contends that a prospective juror was improperly excused for cause. The record, however, clearly reveals that the venireman could not render an impartial decision as to appellant's guilt. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[2] Jurisdiction vests under article V, section 3(b)(1) of the Florida Constitution, and section 921.141(4) of the Florida Statutes (1979).

ORIGINAL

Supreme Court, U.S.
FILED
DEC 3 1984
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NO. 84-533

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Corrections

Petitioner,

-vs-

LUIS CARLOS ARANGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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63 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS' SUA SPONTE ORDER FASHIONING A METHOD TO HOLD THE FEDERAL HABEAS CORPUS PROCEEDINGS IN ABEYANCE WAS A PROPER EXERCISE OF DISCRETION WHEN THE STATE'S HIGHEST COURT IN A SIMULTANEOUS PROCEEDING HAS SEEN SUFFICIENT MERIT IN AN UNEXHAUSTED ISSUE TO DIRECT AN EVIDENTIARY HEARING AND WHERE NO FEDERAL STAY OF EXECUTION IS INVOLVED. (RESTATED)

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NO. 84-533

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LOUIE L. WAINWRIGHT,

Petitioner,

-vs-

LUIS CARLOS ARANGO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Luis Carlos Arango, in forma pauperis, through undersigned counsel, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's Opinion in this case. That Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983) [A.2-4],[1] and the Opinion Denying Petition for Rehearing and Suggestion for Rehearing En Banc is reported at 739 F.2d 529 (11th Cir. 1984) [A. 5-7].

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[1]References to the appendices attached to this brief are cited by the abbreviation "A" followed by the page number.

STATEMENT OF THE CASE

The Statement of the Case submitted by the Petitioner (hereinafter the "State of Florida") is inaccurate and incomplete. Because the State of Florida inaccurately represents the sequence of certain proceedings below, neglects to discuss important aspects of those proceedings, and includes irrelevant facts, Respondent (hereinafter "Mr. Arango") revises the Statement of the Case as follows.

In April, 1984, the Governor of Florida signed a warrant for the execution of Luis Carlos Arango according to the sentence of death imposed upon him for a 1980 conviction for first degree murder.[2] The execution was scheduled for May 3, 1983.

Mr. Arango's Motion for Post-Conviction Relief in the state trial court was denied on April 21, 1984. On that same date, Mr. Arango appealed to the Florida Supreme Court from that Order. Oral Argument in the Florida Supreme Court was scheduled for May 2, 1984, less than 18 hours before the execution.

Subsequently, on April 27, 1984, Mr. Arango filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida. The Petition raised only fully exhausted issues.[3] Mr. Arango simultaneously filed a Motion for Continuance in the district court, advising the court of the proceedings pending in the Florida Supreme Court and its scheduled oral argument.

Mr. Arango suggested that the district court grant a Stay of Execution and continue the federal proceedings to afford the

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[2]The Florida Supreme Court had previously affirmed that conviction and sentence in Arango v. State, 411 So.2d 172 (Fla. 1982), and this court had denied Mr. Arango's petition for Writ of Certiorari in Arango v. Florida, 457 US 1140 (1982).

[3]Subsequent to the filing of this Motion in federal court, Mr. Arango filed in the Florida Supreme Court an Application for Extraordinary Relief to Remedy violations of Brady v. Maryland, and International Law, requesting that court to relinquish its jurisdiction to the state trial court for further proceedings. Subsequent to the state post conviction hearings in April, 1983, and just a few days before oral argument in the Florida Supreme Court, a private investigator discovered that the existence of a third gun had been known to the state at the time of the trial which was not made known to Mr. Arango's counsel. This gun would have corroborated Mr. Arango's defense and precluded his conviction.

Florida Supreme Court an opportunity to rule. Mr. Arango advised the district court that in the event the state court denied him relief, those issues pending in the state court could then be considered at the same time as the fully exhausted issues.

The district court denied Mr. Arango's Motion for Continuance. Instead the district court held an evidentiary hearing on April 30, 1984, but reserved ruling.

The Florida Supreme Court heard oral argument on May 2, 1983, and on that same day entered an unpublished order, without opinion, staying the execution "pending disposition of these proceedings" (A. 8).

Meanwhile, the United States District Court on May 2, 1983, entered an unpublished Order Denying Petition for Writ of Habeas Corpus Subject to Memorandum Opinion Containing Findings of Fact and Conclusions of Law Hereafter to be Filed. The district court stated that due to its notification that the Florida Supreme Court had granted a Stay of Execution there was no longer any need for the federal court to act upon that request, however, the exhausted petition before the federal court was denied.

The United States District Court issued its Memorandum Opinion on May 6, 1983, setting forth its reasons for denying Mr. Arango's Petition for Writ of Habeas Corpus. Arango v. Wainwright, 563 F.Supp 1181 (M.D. Fla. 1983).[4] The district court found, as the State of Florida had stipulated, that the court was not presented with a mixed petition. 563 F.Supp. at 1184; A. 36.

Mr. Arango timely appealed to the United States Court of Appeals for the Eleventh Circuit from the denial of the Petition for Writ of Habeas Corpus. The Eleventh Circuit ordered that the appellate proceedings be expedited. (A. 16).

Mr. Arango filed a Motion to Hold the Appellate Proceedings in Abeyance; or to Remove the Appeal from the Expedited Schedule (A.17-22), pointing out that the Florida Supreme Court had stayed

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[4]In its petition (pg. 2) the State of Florida inaccurately cited this case.

the execution "pending disposition" by that court, therefore no death warrant was in effect nor could the Governor sign one (A. 17-22). The State of Florida did not object to this Motion and it authorized the Court to be notified as follows:

> The Attorney General's office has been contacted and Penny Brill, Assistant Attorney General, has authorized undersigned to represent that the Appellee has no objection to the removal of this cause from the expedited review schedule because of the proceedings before the Florida Supreme Court. The State takes no position regarding the Motion to Hold These Appellate Proceedings in Abeyance and will not be filing any response. [Emphasis in original.]

A. 20.

The Eleventh Circuit denied said Motion (A. 23), notwithstanding the lack of objection on the part of the State of Florida. The briefs of all parties were therefore filed according to the expedited schedule. Mr. Arango did not raise as an issue the district court's denial of his Motion for Continuance.

The Eleventh Circuit scheduled oral argument for September 26, 1983 (A. 16).

Meanwhile, on September 1, 1983, the Florida Supreme Court issued its Opinion regarding those collateral issues which the district court had not considered. Arango v. Wainwright, 437 So.2d 1099 (Fla. 1983) (A.9-15). The Florida Supreme Court remanded the cause for an evidentiary hearing to determine whether an alleged Brady violation warranted a new trial.

Shortly thereafter, the Eleventh Circuit Court of Appeals sua sponte requested counsel for both parties to "advise the Court immediately as to the impact of the Florida Supreme Court opinion on the [pending Eleventh Circuit] appeal and whether oral argument would now be appropriate" (A. 24).

The State of Florida filed its Status Report on September 7, 1984 (A. 29-33) and attached a copy of the Florida Supreme Court's opinion. It was the State of Florida's position that the federal appeal should continue on its expedited schedule since none of the issues considered in the Florida Supreme Court's recent order were the subject of the federal appeal and all of the briefs had already been filed.

Mr. Arango filed his Status Report on September 13, 1983 (A. 25-28). Mr. Arango advised the court that there was no legal reason precluding the Eleventh Circuit from considering the appeal on an expedited basis, but that the court may want to remove the matter from the expedited calendar for reasons of efficient judicial administration as well as in the interests of federalism and comity. Mr. Arango pointed out that since the Florida Supreme Court had found a prima facie Brady violation and ordered an evidentiary hearing, that the trial court could order a new trial or sentencing hearing which would moot the proceedings before the Eleventh Circuit Court of Appeals (A. 25-28). If the trial court did not rule in Mr. Arango's favor, he had a right to a direct appeal to the Florida Supreme Court.

The Eleventh Circuit Court of Appeals advised counsel on September 20, 1983 that the oral argument had been continued. (A. 34). On September 23, 1983 the Eleventh Circuit Court of Appeals entered an order holding the federal proceedings in abeyance by vacating the district court's order and remanding the cause with specific instructions (A. 2-7). The Eleventh Circuit ordered:

> The judgment of the district court is hereby VACATED and the case is REMANDED to the district court to be held in abeyance until the exhaustion of the claims asserted in the present state proceedings.
>
> The Petitioner is given 10 days after the claims presently pending in state court have been exhausted within which to move to dismiss this case as moot or to amend his petition to include all claims he wishes to raise before the federal courts.
>
> The district court shall expeditiously conduct such proceedings as may be appropriate on these other issues, and supplement its prior order to include a decision on all claims presented not heretofore decided.
>
> Upon the entry of a final judgment in the district court, either party may promptly pursue an appeal to this Court. The appeal shall be expedited. The parties shall file supplemental briefs only, the present briefs to be used on all issues presently pending before this Court.
>
> VACATED AND REMANDED. [Emphasis added.]

Arango v. Wainwright, 716 F.2d 1353, 1355 (11th Cir. 1984); A. 4.

The State of Florida filed a Petition for Rehearing and

Suggestion for Rehearing En Banc, arguing that the court's order "creates a precedent by which death sentenced petitioners can implement delaying and dilatory tactics inconsistent with the thrust of such decisions as in Rose v. Lundy, 455 US 509 (1982); Barefoot v. Estelle, 77 L.Ed.2d 1090 (1983); Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc);[5] and Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983)."[6]

The Eleventh Circuit Court of appeals issued an Opinion on July 31, 1984, denying the State of Florida's Petition for Rehearing and Suggestion for Rehearing En Banc. Arango v. Wainwright, 739 F.2d 529 (11th Cir. 1984); A. 5-7.

In its opinion denying rehearing, the court fully addressed all of the issues raised by the State of Florida in its Petition for Writ of Certiorari to this Court. (A. 5-7). The Eleventh Circuit Court of Appeals clarified its Opinion and stated that "the decision in this case was based on the unusual circumstances of this case" and that the law concerning [those issues raised by the State of Florida's Motion for Rehearing] is unaffected by the handling of this case, where a state court has seen sufficient merit in an unexhausted claim to direct an evidentiary hearing, and where no federal stay of execution is involved." Arango v. Wainwright, 739 F.2d 529, 530-531 (11th Cir. 1984); A. 6-7.

The State of Florida nonetheless filed its Petition for Writ of Certiorari in this Court from that Order of the Eleventh Circuit Court of Appeals. Arango v. Wainwright, 716 F.2d 1353 (11th Cir.), reh. denied 739 F.2d 529 (1984); A. 2-4 and 5-7.

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[5]Arango v. Wainwright, 739 F.2d 529, 530 (11th Cir. 1984); A. 6.

[6]While the State's Petition for Rehearing and Suggestion for Rehearing En Banc was pending, this Court denied the State of Florida's Petition for Writ of Certiorari filed in Wainwright v. Thompson, cert. denied, __U.S.__, Case No. 83-1421 (op. filed May 2, 1984) [35 Cr.L. 4029].

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither The Decision Below Nor The Record Raises The Question Presented In The Petition.

The State of Florida misunderstands the decision below probably because the petitioner overlooked the sequence and import of specific procedural events which led to the court's action. One Question Presented in the petition (p. 1) is whether a district court abuses its discretion when it

> "...denies a petitioner's motion for continuance and decides the issues in an exhausted habeas corpus petition on the merits, in lieu of holding the petition in abeyance until other claims pending in state court have been exhausted..."

But the Eleventh Circuit Court of Appeals did not consider or decide that question in this proceeding.

While it is true that Mr. Arango did initially file a motion for continuance at the time that he filed his petition for Writ of Habeas Corpus in the district court, he did not appeal from the denial of said motion. Moreover the appellate court did not review "the propriety of the district court's order", as the State of Florida suggests in its petition at page 10.

The sua sponte order of the Eleventh Circuit was in response to a set of unusual circumstances that developed subsequent to the filing of the Notice of Appeal from the district court's order.

After all of the briefs had been filed and just before the scheduled oral argument in the Eleventh Circuit Court of Appeals, an opinion was rendered by the Florida Supreme Court which held that Mr. Arango had made a prima facie showing of a Brady[7] violation which, if true, would mandate a new trial or new sentencing hearing. Arango v. Wainwright, 437 So.2d 1099 (Fla. 1983); A. 9-15.

The Florida Supreme Court therefore remanded the cause to the trial court with instructions to conduct an evidentiary hearing on the claimed Brady violation (437 So.2d at 1104-1105; A. 14-15). The Florida Supreme Court further extended its previously entered Stay

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[7]Brady v. Maryland, 373 US 83 (1963).

of Execution pending the outcome of that hearing. Arango v. Wainwright, 437 So.2d 1099, 1105 (Fla. 1983); A. 15.

Therefore the Eleventh Circuit Court of Appeals took into consideration that after the Notice of Appeal was filed in the federal matter, 1) the capital case pending before it was simultaneously proceeding in state court upon grounds which were not ripe for federal consideration until exhausted in state courts; 2) those state proceedings had a substantial likelihood of success which could moot the federal appeal;[8] and 3) no federal stay of execution was involved.

Based upon "the interests of judicial economy" the Eleventh Circuit decided that "this federal proceeding should be held in abeyance" until those claims pending in state court proceedings are exhausted and either consolidated with the federal proceedings or the federal proceedings dismissed as moot. Arango v. Wainwright, 716 F.2d 1353, 1355 (11th Cir. 1983), A. 4.

In the instant case, the Eleventh Circuit did not even consider the question of whether a district court abuses its discretion in denying a motion for Continuance. The court's only focus was on the special circumstances which arose after the district court ruled and while the appeal was pending. That question which the State of Florida puts to this court therefore cannot be extracted from the facts or opinion below. This Court recently denied the State of Florida's Petition for Writ of Certiorari in Wainwright v. Thompson, __US__, Case No. 83-1421 (op. filed May 2, 1984) [35 Cr.L. 4029] where that question was at issue, and the State of Florida is now adjusting the facts of this case in a thinly veiled attempt to repetition this Court for review of the Thompson question.

2. There Is No Conflict Between The Decision Below And Those Cases Named In The Petition.

Because the State of Florida misunderstands the basis and impact of the decision below, the petition erroneously alleges conflict with certain cases where none exists.

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[8]As of this date, the evidentiary hearing has been held in the trial court, and an appeal taken from the trial court's denial of relief. Oral argument took place on November 7, 1984 in the Florida Supreme Court, Case No. 64,721.

First, it is completely baseless for the State of Florida to suggest that the opinion below conflicts with this court's opinion in Barefoot v. Estelle, __U.S.__, 103 S.Ct. 3383 (1983), because "a stay of execution of the state judgment is not involved in this case." Arango v. Wainwright, 739 F.2d 529, 530 (11th Cir. 1984); A. 6.

Further, the opinion below in no way sets standards or precedent to guide a district court on when or under what circumstances to exercise discretion in granting continuances. The Eleventh Circuit, in its opinion denying rehearing, reassured the State of Florida that it was not receding from its previous position on that question. The Court stated in dicta:

> When a district court is presented with a federal habeas corpus petition raising only exhausted claims, the court is not required to grant a continuance if the petitioner has other claims still pending in state court. Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983). [Emphasis added.]

Arango v. Wainwright, 739 F.2d 529, 530 (11th Cir. 1984); A. 6.

Likewise the decision below "does not suggest that a petitioner can pursue exhausted claims and at the same time not waive unasserted, unexhausted claims," Id. at 530, and therefore does not conflict with Rose v. Lundy, 455 US 509 (1982).

The court below in its order denying rehearing, specifically reiterated its position that when a district court is presented with a federal habeas corpus petition raising only exhausted claims

> the court can treat the petition and motion for continuance as, in effect, presenting a mixed petition and dismiss it. See, Rose v. Lundy, 455 US 509, 518-19, 102 S.Ct. 1198, 1203-04, 71 L.Ed.2d 399 (1982). [Emphasis added.]

Arango v. Wainwright, 739 F.2d at 530 (11th Cir. 1984); A.6.

Indeed, the State of Florida should not be allowed to complain to this court that the decision below conflicts with Rose v. Lundy because the State of Florida stipulated in the district court that Mr. Arango had not presented a mixed petition and the state did offer to waive exhaustion requirements as to those issues simulataneously pending in the Florida Supreme Court. The district court relied upon that stipulation and in its recitation of the facts

stated:

> All the issues that were presented to this court for review had been presented to the Florida Supreme Court either on direct appeal or by petition for writ of habeas corpus. Therefore, this Court found and the State stipulated, that Arango had exhausted all of his state court remedies for the purpose of the present petition for writ of habeas corpus and regardless of the petition for writ of habeas corpus and appeal pending before the Florida Supreme Court, this court was not presented with a mixed habeas corpus petition. See Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 L.Ed.2d 379 (1982). [Emphasis added.]

Arango v. Wainwright, 563 F.Supp. 1181, 1184 (S.D. Fla. 1983); A. 38.

In addition, the opinion below does not conflict with the Fifth Circuit's opinion in Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc) because the action taken here by the Eleventh Circuit differs. In Galtieri the Fifth Circuit speculated upon the potential for federal-state conflict or problems in federal court if a second petition is filed:

> The potential for federal-state conflict is subtantial even when the district court does not grant the writ on the merits and the appellate court vacates the district court's judgment for want of exhaustion of all claims. Since the appellate disposition carries no implication as to the correctness of the district court's resolution of the merits, the prisoner is free, depending on the outcome of the state court consideration of his unexhausted claims, to relitigate in federal court the merits of his previously exhausted claim. There is nothing to preclude the state court, if it reconsiders that claim (together with the previously unexhausted claims), or the district court, in round two, from reaching a result on the exhausted claim that is at odds with the district court's initial disposition. Moreover, in the second presentation of the petition in district court, the problem regarding the judge's qualification to sit may arise.

Galtieri v. Wainwright, 528 F.2d 348, 362 (5th Cir. 1978) (en banc).

None of those considerations are applicable here because the Eleventh Circuit remanded the cause with certain specific instructions "in order to avoid the repetition and delays that can occur in those proceedings."

First, Mr. Arango was limited to only ten (10) days after exhausting the issues pending in the state court to return to federal court. If the state court has not made the federal cause

moot, then Mr. Arango may supplement his petition to include those issues not previously exhausted. The order specifies that the district court should address itself only to these new issues and "supplement its prior order to include a decision on all claims presented not heretofore decided." [Emphasis added.] 716 F.2d at 1355; A.4. Therefore, here, there is no opportunity for relitigation of the original issues.

Furthermore, the Eleventh Circuit provided that either party may appeal from the district court's supplemented decision. The Eleventh Circuit however, limited such appeal to supplemental briefs on the new issues and the formerly filed briefs shall be used on the issues raised in the first petition. The appeal will be expedited.

Therefore, although technically the Eleventh Circuit Court of Appeals vacated the district court's opinion without reaching the merits, due to the unusual circumstances of this cause and the limitations of its order, the effect of the order below merely holds the federal proceedings in abeyance for purposes of efficient judicial administration.

For some unfathonable reason the State of Florida seeks review of the Eleventh Circuit's action. Since the order below was rendered sua sponte (See A. 24-34) by the Eleventh Circuit for the explicit purpose of establishing orderly judicial administration, it is difficult to take seriously the petitioner's accusations that somehow Mr. Arango wrought the opinion from the Court of Appeals to "circumvent the rules in Rose v. Lundy, through the use of dilatory tactics." (See the State's petition at page 13.) Here it is the State who is attempting piecemeal litigation.

3. The Uniqueness Of This Case Precludes Review By This Court.

There is no question of national importance here because the opinion below presents no precedent even within its own circuit. The Eleventh Circuit Court of Appeals was sensitive to the State of Florida's concern that this case may create a precedent by which death sentenced persons could implement delaying and dilatory tactics. The Court explained, in its order denying rehearing, "the

decision in this case should be of little use in accomplishing such a purpose... This decision should furnish no authority upon which to base a stay of execution while a petitioner exhausts unasserted claims." 739 F.2d at 530; A. 6. [Emphasis added.]

With regard to the State of Florida's claim that this decision erodes the holding in Rose v. Lundy, 455 US 509 (1982), the Eleventh Circuit explained:

> Nor does this decision indicate the state somehow loses its opportunity to assert successive petition defenses if known but unasserted claims are later brought to the federal court. It does not decide whether a federal court would err in dismissing a petition asserting only exhausted claims where the petitioner refuses to waive unasserted claims which are being actively pressed in the state courts. Any time that a district court knows a petitioner is attempting to piecemeal claims to delay ultimate termination of litigation, the law as to the abuse of the writ might well involve first petitions as well as successive petitions. This case does not touch on those issues. [Emphasis added.]

Arango v. Wainwright, 739 F.2d at 530; A. 6.

The Eleventh Circuit makes it clear in its opinion below that "the law concerning these issues is unaffected by the handling of this case..." Id. at 530; A. 6. Rather, "the decision in this case was based on the unusual circumstances of this case." Id. at 531; A. 7.

The State of Florida in its petition (pg. 17) misinterpreted the "unusual circumstances" as referring to the nature of the sentence. To the contrary, the Eleventh Circuit Court of Appeals explains in its opinion denying rehearing that the circumstances of this case are special because after the federal appeal was filed, 1) the state court found sufficient merit in an unexhausted claim to direct an evidentiary hearing, and 2) no federal stay of execution was involved. Id. at 531: A.7.

Because the decision below is limited to the unique circumstances of this case, and establishes no national precedent, it does not qualify for review by this court.

CONCLUSION

For these reasons, Respondent Luis Carlos Arango respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

NO. 84-533

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

LOUIE L. WAINWRIGHT,

Petitioner,

-vs-

LUIS CARLOS ARANGO,

Respondent.

A P P E N D I C E S

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EDITOR'S NOTE

PAGES A-2 thru A-15 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

suspension. Rule 260.6(10). Attorneys over the age of seventy-five may apply for an exemption based on good faith inability to comply. Rule 260.5.

Verner filed suit under 42 U.S.C. §§ 1983, 1985, 1994 (1976), seeking injunctive relief and over nine million dollars in damages from defendants. He claims, *inter alia*, that requiring lawyers to complete continuing legal education requirements violates: First Amendment rights of speech, assembly, and grievance; Fourteenth Amendment rights of due process and equal protection; the Eighth Amendment Prohibition against cruel and unusual punishment; and the Thirteenth Amendment prohibition against involuntary servitude.

[1] After a comprehensive analysis, the district judge granted defendants' motion to dismiss. *Verner v. Colorado*, 533 F.Supp. 1109 (D.Colo.1982). The court noted initially that actions seeking review of a state disciplinary order addressed to a particular attorney may only be brought by writ of certiorari to the United States Supreme Court. *Id.* at 1112; *see Phelps v. Kansas Supreme Court*, 662 F.2d 649, 651 (10th Cir.1981), *cert. denied*, 456 U.S. 944, 102 S.Ct. 2009, 72 L.Ed.2d 466 (1982); *Younger v. Colorado State Board of Law Examiners*, 625 F.2d 372, 375–76 (10th Cir.1980). Accordingly, the court correctly held that it "only has jurisdiction to consider plaintiff's challenges to the constitutionality of rule 260." 533 F.Supp. at 1112.

[2, 3] Having determined its jurisdiction, the trial court addressed the substantive issues presented. The court found that Verner's damage claims were barred by the Eleventh Amendment and by judicial and quasi-judicial immunities. It then considered Verner's claims for injunctive relief and found them without merit.

As the trial court noted, the basic issue presented is a novel one: whether a state supreme court may constitutionally require attorneys to meet continuing legal education requirements. Ample precedent exists supporting the authority to prescribe minimum levels of legal competency, measured by a bar examination, as a prerequisite to admission to a state bar. *E.g., Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957); *Posta v. Givan*, 651 F.2d 495, 497 (7th Cir. 1981); *Tyler v. Vickery*, 517 F.2d 1089, 1101–02 (5th Cir.1975), *cert. denied*, 456 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976); *Chaney v. State Bar*, 386 F.2d 962, 964 (9th Cir.1967), *cert. denied*, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968). *A fortiori*, a state can require an attorney to take reasonable steps to maintain a suitable level of competency, so long as such requirements have a "rational connection with the [attorney's] fitness or capacity to practice law." *Schware*, 353 U.S. at 239, *quoted in Younger*, 625 F.2d at 377. We cannot say that the CLE requirements in Colorado have no rational connection to a lawyer's suitability to practice law.

We have reviewed Verner's other contentions on appeal, and we are not persuaded that they have merit.

AFFIRMED.

Luis Carlos ARANGO, a/k/a Carlos Luis Arango, Florida Inmate No. 075042, Petitioner-Appellant,

v.

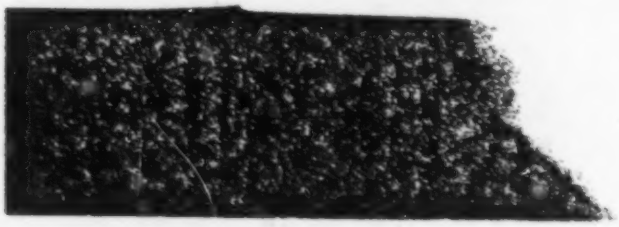
Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent-Appellee.

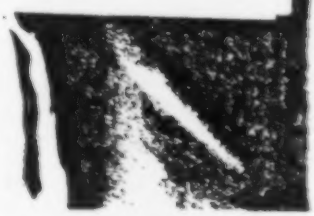
No. 83-5421.

United States Court of Appeals, Eleventh Circuit.

Sept. 22, 1983.

State death-row prisoner appealed from a decision of the United States District Court for the Southern District of Florida, Eugene P. Spellman, J., 563





F.Supp. 1181, denying his petition for writ of habeas corpus. The Court of Appeals held that in interests of judicial economy, federal habeas corpus proceeding would be held in abeyance until all of claims petitioner wanted to assert were exhausted and brought before federal court.

Vacated and remanded.

Habeas Corpus ⇐45.3(1)

In interests of judicial economy, federal habeas corpus proceeding would be held in abeyance until all of claims petitioner wanted to assert were exhausted and brought before federal court where petitioner had not waived claims being simultaneously asserted in state court, state court proceeding could potentially moot federal proceeding, past experience in death cases indicated that if relief was denied in state court, petitioner would assert those claims in successive petition in federal court and would probably incorperate some of claims which were subject of pending petition, and there was no time limitation within which successive petition would have to be filed.

Sharon B. Jacobs, Chaykin, Karlan & Jacobs, Coral Gables, Fla., for petitioner-appellant.

Penny H. Brill, Asst. Atty. Gen., Miami, Fla., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, FAY and ANDERSON, Circuit Judges.

BY THE COURT:

This is an appeal from the denial, 562 F.Supp. 1181, of a petition for writ of habeas corpus filed on behalf of Petitioner, Luis Carlos Arango, pursuant to 28 U.S.C.A. § 2254, which petition asserts six grounds for constitutional error in Arango's conviction for murder and sentence to death.[1]

After this case was scheduled for oral argument, it came to the Court's attention that Petitioner is pursuing in state court other claims attacking the constitutionality of his conviction and sentence. The Supreme Court of Florida has decided eight of those claims against him.[2] Arango v. State

1. (1) wrongful exclusion of prospective juror who did not make it unmistakably clear he would vote against the death penalty regardless of the facts (*Witherspoon*);
(2) the unconstitutional shifting of the burden of persuasion to Petitioner in the trial court's instructions to the sentencing jury on the question of whether mitigating circumstances outweighed aggravating circumstances;
(3) wrongful admission of expert testimony introduced to establish that the crime was "especially heinous, atrocious, or cruel";
(4) the imposition of a disproportionate penalty;
(5) the Florida Supreme Court's ex parte review of nonrecord information in capital appellants' case (the *Brown* issue); and
(6) his sentence is deprived of legitimacy because of the public's perception of the apparent impropriety of the Florida Supreme Court review of nonrecord information in certain capital cases.

2. Petitioner urged that he received ineffective assistance of counsel on direct appeal and, in support, cited nine issues which his counsel failed to raise on appeal. Listed below are the eight issues the court found to be without merit:
(1) denial of Petitioner's motions for mistrial and to voir dire a juror because the judge and juror smiled during Petitioner's testimony;
(2) refusal of judge to permit introduction of newspaper clippings in suggestion showing that murder victim was notorious Mafia figure;
(3) improper consideration of a non-statutory aggravating factor not supported by evidence;
(4) indictment violated sixth amendment and due process clause of the fourteenth amendment by not including aggravating factors to be considered;
(5) the Florida death penalty statute, facially and as applied, violates the fifth, sixth, eighth, and fourteenth amendments by failing to channel jury discretion and by permitting irrelevant factors into the sentencing process by jury and judge;
(6) the death sentence violated the sixth, eighth, and fourteenth amendments in that incorrect jury instructions were given and correct jury instructions were refused;
(7) imposition of the death sentence after Petitioner rejected a plea bargain offer of life imprisonment violated the sixth, eighth, and fourteenth amendments;
(8) Petitioner's due process rights to a fair and impartial jury was violated in that the jury which recommended the death penalty was

...ds, Chaykin, Karlan & Ja...
...es, Fla., for petitioner-ap...

...l, Asst. Atty. Gen., Miami,
...ent-appellee.

...ke; United States District
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...r, FAY and ANDERSON,

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and *Arango v. Wainwright*, Case Nos. 63,-562; 63,563, — So.2d — (Fla. Sept. 1, 1983). The Florida court remanded the case to the state trial court for an evidentiary hearing on an alleged *Brady* violation.

Prior to the Florida Supreme Court's decision, none of these claims could have properly been considered by a federal court because Petitioner had not exhausted his state remedies. 28 U.S.C.A. §§ 2254(b), (c). The *Brady* claim still pending in the state court could not be presented at this time to the federal court. If the unexhausted claims had been alleged, the district court would have been required to dismiss the petition containing both exhausted and unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982). Under *Rose*, the Petitioner then could have amended to present only exhausted claims, or returned to the state court for exhaustion prior to bringing the federal petition. The failure to include unexhausted claims could, however, cause the Petitioner to lose the opportunity to litigate in the future the unexhausted claims. 455 U.S. at 520, 102 S.Ct. at 1204.

This Court knows certain things: (1) Petitioner has not waived the claims being asserted in state court; (2) the state court proceeding could potentially moot this federal proceeding; (3) past experience in death cases indicates that if relief is denied in the state court, Petitioner will assert those claims in a successive petition in federal court and will probably incorporate some of the claims here asserted; (4) there is no time within which such a successive petition would have to be filed, so that what is being done on this appeal might require reconsideration on a second petition.

In the interests of judicial economy, this federal proceeding should be held in abeyance until all of the claims Petitioner wants to assert are exhausted and brought before a federal court. In order to avoid the repetition and delays that can occur in these proceedings, the Court enters the following order:

The judgment of the district court is hereby VACATED and the case is REMANDED to the district court to be held in abeyance until the exhaustion of the claims asserted in the present state proceedings.

The Petitioner is given 10 days after the claims presently pending in state court have been exhausted within which to move to dismiss this case as moot or to amend his petition to include all claims he wishes to raise before the federal courts.

The district court shall expeditiously conduct such proceedings as may be appropriate on these other issues, and supplement its prior order to include a decision on all claims presented not heretofore decided.

Upon the entry of a final judgment in the district court, either party may promptly pursue an appeal to this Court. The appeal shall be expedited. The parties shall file supplemental briefs only, the present briefs to be used on all issues presently pending before this Court.

VACATED AND REMANDED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Amos LISENBY, Defendant-Appellant.

No. 80-5963.

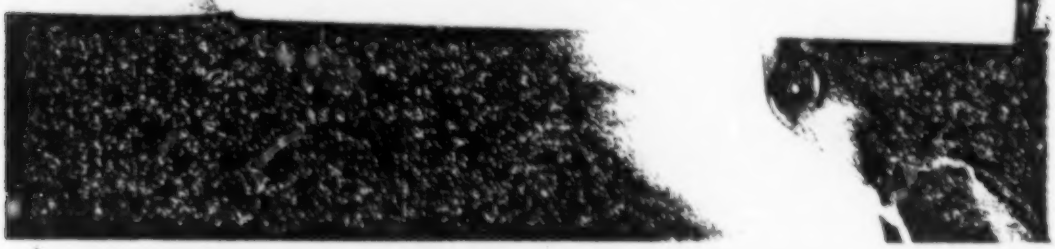
United States Court of Appeals, Eleventh Circuit.

Oct. 11, 1983.

Defendant was convicted in the United States District Court for the Northern District of Florida, Lynn C. Higby, J., of conspiracy to possess and possession with in-

...composed of jurors who favored the death penalty and who had already rejected his trial ...

...defenses as to guilt and formed an unfair and ...prejudicial mindset.



it drastically reduces the time available to obtain signatures from the one-year period normally provided.[5]

[2] Having concluded that voting and associational rights are directly burdened by applying the amended law to plaintiffs in 1984, we must examine the interests offered in justification by the State. Wyoming contends that the law assures that a new party can demonstrate a modicum of support, and keeps the ballot to a reasonable size so that the winner will be the choice of a majority or strong plurality. The State also argues that the June 1 filing deadline is necessary to provide the Secretary of State sufficient time to check the validity of the signatures before the primary candidate filing period begins in late June.[6] Even if we were to assume that these reasons would be sufficient under ordinary circumstances, the State in this case agreed to a compromise whereby plaintiffs would be required to obtain only 1,333 signatures to qualify as a new political party this year.[7] Plaintiffs represented to this court that they had gathered 2,735 signatures by the June 1 deadline. We do not see how the State can argue on appeal that it has a compelling interest in plaintiffs meeting the 8,000 signature requirement this year when it specifically agreed below that 1,333 signatures would satisfy that interest due to the shortened time for obtaining signatures. Given the substantial constitutional rights affected, we conclude that if plaintiffs have obtained 1,333 valid signatures, they must be given new political party status for purposes of the 1984 election.

Reversed and remanded for further proceedings in light of this opinion.

5. We reject the State's argument that plaintiffs could and should have begun to obtain signatures before the district judge ordered remedial action. After prevailing on their summary judgment motion, plaintiffs could not have been expected to expend the funds necessary to begin circulating petitions when the law pertaining to such petitions was in limbo.

Luis Carlos ARANGO, a/k/a Carlos Luis Arango, Florida Inmate No. 075042, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 83-5421.

United States Court of Appeals, Eleventh Circuit.

July 31, 1984.

After the Court of Appeals, 728 F.2d 1353, vacated denial of habeas corpus relief by the United States District Court for the Southern District of Florida, Eugene P. Spellman, J., 563 F.Supp. 1181, the state petitioned for rehearing. The Court of Appeals held that vacation of denial of habeas corpus relief and remand to District Court to wait until collateral claims in state court either rendered federal claims moot or were exhausted so that they could be joined with federal petition if petitioner so desired did not create precedent by which death-sentence petitioners could implement delaying and dilatory tactics.

Petition denied.

1. Habeas Corpus ⇐113(13)

Action of Court of Appeals, in vacating denial of habeas corpus relief and remanding case to district court to wait until collateral claims in state court either rendered federal claims moot or were exhausted so

6. Plaintiffs indicated in oral argument that the Libertarian Party in Wyoming is not likely to have a primary contest in 1984.

7. In order to retain its status for the future, a political party must field a candidate for the United States Congress who receives at least ten percent of the total vote cast for that seat. Wyo. Stat. § 22-1-103(g).

that they could be joined with federal petition if petitioner so desired, did not create a precedent by which death-sentence petitioners might implement delaying and dilatory tactics.

2. Habeas Corpus ⇐45.3(1)

When a district court is presented with a federal habeas corpus petition raising only exhausted claims, court is not required to grant continuance if petitioner has other claims still pending in state court; court can treat petition and motion for continuance as, in effect, presenting a mixed petition and dismiss it; or in the alternative, petitioner can waive his right to federal habeas corpus relief on unexhausted claims.

Sharon B. Jacobs, Chaykin, Karlan & Jacobs, Coral Gables, Fla., for petitioner-appellant.

Penny H. Brill, Asst. Atty. Gen., Miami, Fla., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 22, 1983, 11 Cir., 1983, 716 F.2d 1252).

Before RONEY, FAY and ANDERSON, Circuit Judges.

BY THE COURT:

In this case, because of special circumstances known to the Court, we vacated the denial of habeas corpus relief, 563 F.Supp. 1181, and remanded the case to the district court to wait until collateral claims in the state court either rendered the federal claims moot or were exhausted so that they could be joined with the federal petition, if the petitioner so desired.

[1] The state's petition for rehearing suggests that the action taken in this case creates a precedent by which death sentence petitioners can implement delaying and dilatory tactics inconsistent with the thrust of such decisions as in *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), *Barefoot v. Estelle*, — U.S. —, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), and *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir.1978) (en banc).

The decision in this case should be of little use in accomplishing such a purpose. A stay of execution of the state judgment is not involved in this case. This decision should furnish no authority upon which to base a federal stay of execution while a petitioner exhausts unasserted claims. It does not suggest that a petitioner can pursue exhausted claims and at the same time not waive unasserted, unexhausted claims. Nor does this decision indicate the state somehow loses its opportunity to assert successive petition defenses if known but unasserted claims are later brought to the federal court. It does not decide whether a federal court would err in dismissing a petition asserting only exhausted claims where the petitioner refuses to waive unasserted claims which are being actively pressed in the state courts. Any time that a district court knows a petitioner is attempting to piecemeal claims to delay ultimate termination of litigation, the law as to the abuse of the writ might well involve first petitions as well as successive petitions. This case does not touch on these issues.

[2] When a district court is presented with a federal habeas corpus petition raising only exhausted claims, the court is not required to grant a continuance if the petitioner has other claims still pending in state court. *Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir.1983). The court can treat the petition and motion for continuance as, in effect, presenting a mixed petition and dismiss it. *See Rose v. Lundy*, 455 U.S. 509, 518-19, 102 S.Ct. 1198, 1203-04, 71 L.Ed.2d 379 (1982). In the alternative, the petitioner can waive his right to federal habeas corpus relief on the unexhausted claims.

The law concerning these issues is unaffected by the handling of this case, where a

state court has seen sufficient merit in an unexhausted claim to direct an evidentiary hearing, and where no federal stay of execution is involved.

The decision in this case was based on the unusual circumstances of this case, grounded in judicial economy and with full knowledge that a decision on this appeal might not terminate this litigation and might be rendered moot.

The petition for rehearing is DENIED, and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

Howard Virgil Lee DOUGLAS, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and David H. Brierton, Superintendent of Florida State Prison at Starke, Florida, Respondents-Appellees.

No. 81-5927.

United States Court of Appeals, Eleventh Circuit.

Aug. 1, 1984.

Proceeding was instituted on petition of state prisoner for federal habeas corpus relief. The United States District Court for the Middle District of Florida, Ben Krentzman, J., 521 F.Supp. 790, denied petition, and petitioner appealed. The Court of Appeals, 714 F.2d 1532, affirmed in part and reversed in part. The Supreme Court, 104 S.Ct. 3575, granted certiorari, vacated judgment, and remanded for further consideration. The Court of Appeals held that: (1) exclusion of members of general public from courtroom during testimony of one witness in murder prosecution was not a violation of habeas petitioner's general Sixth Amendment public trial guarantee which would warrant habeas relief, and (2) trial counsel's ineffective assistance warranted habeas corpus relief.

Panel opinion reinstated.

Roney, Circuit Judge, dissented and filed a statement.

1. Criminal Law ⇐=641

Exclusion of members of general public from courtroom during testimony of one witness in murder prosecution was not a violation of habeas petitioner's general Sixth Amendment public trial guarantee. U.S.C.A. Const.Amend. 6.

2. Habeas Corpus ⇐=24.1(4)

Trial counsel's ineffective assistance warranted habeas corpus relief. U.S.C.A. Const.Amend. 6.

Elliott C. Metcalfe, Jr., Public Defender, Larry Helm Spalding, Sarasota, Fla., Steven M. Goldstein, Tallahassee, Fla., for petitioner-appellant.

Alan Ellis, Philadelphia, Pa., for amicus curiae Nat. Ass'n of Criminal Defense Lawyers.

Louis Carres, Public Defender, West Palm Beach, Fla., for amicus curiae Florida Public Defenders Ass'n.

Richard W. Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Florida.

On Remand from the Supreme Court of the United States.

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

IN THE SUPREME COURT OF FLORIDA

MONDAY, MAY 2, 1983

CARLOS LUIS ARANGO, ETC.,	**	
Petitioner,	**	
vs.	**	CASE NO. 63,563
LOUIE L. WAINWRIGHT,	**	
Respondent.	**	
** ** ** ** ** ** ** ** **		
CARLOS LUIS ARANGO, ETC.,	**	
Appellant,	**	
vs.	**	CASE NO. 63,562
STATE OF FLORIDA,	**	
Appellee.	**	
** ** ** ** ** ** ** ** **		

The Application for Stay of Execution is granted and the execution of Carlos Luis Arango is hereby stayed pending disposition of these proceedings.

ALDERMAN, C.J., OVERTON, McDONALD and SHAW, JJ., Concur
ADKINS, BOYD, and EHRLICH, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C
cc: Sharon B. Jacobs, Esquire
of Chaykin, Karlan & Jacobs
Penny Hershoff Brill, Esquire
Superintendent C. G. Strickland,

that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense. The key to recognizing these crimes is to first determine whether the completed offense is a crime requiring specific intent or general intent. If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime. We believe there is logic in this approach and that it comports with legislative intent. Second-degree and third-degree murder under our statutes are crimes requiring only general intent.

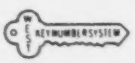
In the instant case, the appellant, while allegedly in a drunken state, swore at his father, choked him, snapped a pistol several times to his head and when the weapon failed to fire, struck the father in the head with the gun. Had a homicide occurred, there can be no doubt that the appellant could have been successfully prosecuted for second-degree murder without the state adducing proof of a specific intent to kill. The fact that the father survived was not the result of any design on the part of the appellant not to effect death but was simply fortuitous. We can think of no good reason to reward the appellant for such fortuity by imposing upon the state the added burden of showing a specific intent to kill in order to successfully prosecute the attempted offense.

[3, 4] It is universally recognized that voluntary intoxication is never an excuse for the perpetration of a criminal act and may be used only to negate essential elements of the crime. In this instance voluntary intoxication could only be used to show that the intoxication was so extensive as to suspend the power of reasoning, rendering the appellant incapable of entertaining the requisite specific intent. In conformity with our conclusion that proof of specific intent is unnecessary to prosecute the offense of attempted second-degree murder, a charge relative to voluntary intoxication was properly refused.

The district court opinion is approved.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.



Carlos Luis ARANGO, Appellant,

v.

The STATE of Florida, Appellee.

Carlos Luis ARANGO, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent.

Nos. 63562, 63563.

Supreme Court of Florida.

Sept. 1, 1983.

Petitioner, who was convicted of first-degree murder and sentenced to death, sought writ of habeas corpus and stay of his execution pending final disposition of writ. By separate application, he petitioned for stay of execution and extraordinary relief to remedy alleged violations of *Brady* and international law. Petitioner also appealed the denial by the Circuit Court, Dade County, Robert M. Dechl, J., of his motion for postconviction relief. The Supreme Court held that: (1) petitioner was not denied ineffective assistance of counsel on direct appeal; (2) State's failure to preserve exculpatory evidence and issues which were either raised, or could have been raised, on appeal did not present issues appropriate for postconviction relief challenges; (3) postconviction relief judge did not err in failing to attach portions of files and records conclusively showing that petitioner was entitled to no relief, since petitioner

was granted hearing, and such attachment is required only if no hearing is held; (4) imposition of death penalty would not violate international law; but (5) petitioner was entitled to hearing on State's failure to make him aware of pistol, which was allegedly exculpatory evidence.

Remanded.

McDonald, J., concurred specially and filed opinion in which Overton, J., joined.

Adkins, Boyd, Ehrlich, JJ., concur to portions of opinion denying habeas corpus and affirming denial of the 3.850 motion, but dissent to remanding for hearing on *Brady* violation.

1. Criminal Law ⇐700

Violation of right to fair trial based on prosecution's withholding of exculpatory evidence is normally predicated on defendant's not knowing of withheld evidence; where defendant is aware of evidence before or during trial, appropriate action is motion to compel discovery or motion to dismiss. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(7)

Trial court's denial of petitioner's motion to dismiss predicated upon State's admitted loss of allegedly exculpatory evidence was not such that the failure to appeal its denial amounted to ineffective counsel, where facts showed that murder occurred in petitioner's apartment, that missing evidence was shirt found in bathroom sink, and there was evidence that petitioner had, at least partially, changed his clothes and attempted to clean himself prior to arrival of police. U.S.C.A. Const. Amend. 6.

3. Criminal Law ⇐641.13(7)

Petitioner was not denied effective assistance of counsel in prosecution for first-degree murder because of counsel's failure to raise issue of judge's alleged consideration of nonstatutory aggravating circumstance, since judge's statement that petitioner acted in premeditated, senseless and cruel manner that was indicative of unreasonable, unlawful and violent nature of petitioner bore on judge's finding that act was especially heinous, atrocious, or cruel.

4. Criminal Law ⇐998(3)

Petitioner convicted of first-degree murder was not entitled to postconviction relief on basis of State's failure to preserve allegedly exculpatory evidence which was not known to petitioner during course of trial, nor on basis of issues which were either raised, or could have been raised, on appeal. West's F.S.A. RCrP Rule 3.850.

5. Criminal Law ⇐998(18)

When motion for postconviction relief is filed, the presiding judge may determine that motion itself is legally insufficient and deny motion without hearing, or determine that files and records in case conclusively show that prisoner is entitled to no relief and deny motion without hearing, attaching copy of portion of files and records conclusively showing no entitlement to relief, or determine that hearing is required for disposition of motion. West's F.S.A. RCrP Rule 3.850.

6. Criminal Law ⇐998(17)

In hearing for postconviction relief, trial judge's determination that preliminary supporting evidence was necessary before he could realistically consider granting various ancillary motions was correct, since burden was on petitioner to support his pending motions. West's F.S.A. RCrP Rule 3.850.

7. Criminal Law ⇐641.13(7)

Defense counsel's four-month delay in verifying motion for postconviction relief and scheduling motion for hearing just prior to scheduled week of petitioner's execution could be described at best as dilatory and, at worst, as an abuse of process, where petitioner appeared at hearing unprepared to carry burden of producing evidence, demanding instead that he be granted stay of execution and appointment of investigators and experts in speculative expectation that he might be able at some unknown future date to develop evidence to support motion for postconviction relief. Supreme Court

condemns such tactics as unworthy of legal profession. West's F.S.A. RCrP Rule 3.850.

8. Criminal Law ⇐998(18)

Attaching portions of files and records conclusively showing that petitioner is entitled to no postconviction relief is only required if no hearing was held, but petitioner was granted hearing and there was thus no error. West's F.S.A. RCrP Rule 3.850.

9. Criminal Law ⇐998(18)

Claim of petitioner that semiautomatic pistol was found on day following murder under balcony of petitioner's apartment, and was turned over to police investigating murder, that this evidence was exculpatory and that State failed to produce evidence despite discovery motion specifically requesting physical evidence corroborating petitioner's statements that other Latin males entered apartment and committed homicide, made prima facie case that prosecution violated petitioner's rights to fair trial by withholding exculpatory evidence, and entitled petitioner to hearing. U.S.C.A. Const.Amend. 6.

Sharon B. Jacobs and Steven E. Chaykin of Chaykin, Karlan & Jacobs, Coral Gables, for appellant/petitioner.

Jim Smith, Atty. Gen., and Penny Hershoff Brill and Carolyn M. Snurkowski, Asst. Attys. Gen., Miami, for appellee/respondent.

PER CURIAM.

Arango was convicted of first-degree murder and sentenced to death in July, 1980. We affirmed the conviction and sentence on direct appeal. *Arango v. State*, 411 So.2d 172 (Fla.), *cert. denied*, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982). Arango petitions for a writ of habeas corpus on the ground that he was denied effective assistance of counsel on direct appeal and for a stay of his execution pending final disposition of his petition for writ of habeas corpus. By separate application, he petitions for a stay of execution and extraordinary relief to remedy alleged violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and international law. Arango also appeals the denial of his rule 3.850 motion for post-conviction relief. We have jurisdiction. Art. V, § 3(b)(7) & (9), Fla. Const. We deny the petition for writ of habeas corpus based on ineffective assistance of counsel and the application for extraordinary relief based on violation of international law, affirm the denial of the rule 3.850 motion, and remand for a hearing on the *Brady* violation.

HABEAS CORPUS

Petitioner urges that he received ineffective assistance of counsel on direct appeal and, in support, cites nine issues which his counsel failed to raise on appeal:

1. Denial of petitioner's motion to dismiss when state failed to preserve and make available physical evidence which would have proven innocence.

2. Denial of petitioner's motions for mistrial and to voir dire a juror because the judge and juror smiled during petitioner's testimony.

3. Refusal of judge to permit introduction of newspaper clippings in mitigation showing that murder victim was notorious Mafia figure.

4. Improper consideration of a nonstatutory aggravating factor not supported by evidence.

5. Indictment violated sixth amendment and due process clause of the fourteenth amendment by not including aggravating factors to be considered.

6. The Florida death penalty statute, facially and as applied, violates the fifth, sixth, eighth, and fourteenth amendments by failing to channel jury discretion and by permitting irrelevant factors into the sentencing process by jury and judge.

7. The death sentence violated the sixth, eighth, and fourteenth amendments in that incorrect jury instructions were given and correct jury instructions were refused.

8. Imposition of the death sentence after petitioner rejected a plea bargain

offer of life imprisonment violated the sixth, eighth, and fourteenth amendments.

9. Petitioner's due process right to a fair and impartial jury was violated in that the jury which recommended the death penalty was composed of jurors who favored the death penalty and who had already rejected his trial defenses as to guilt and formed an unfair and prejudicial mindset.

We find that all of petitioner's arguments are without merit and that only points 1 and 4 require discussion.

Petitioner contends that he was denied effective assistance of counsel because his lawyer failed to appeal the trial court's denial of his motion to dismiss based on the state's acknowledged failure to preserve a bloody yellow shirt discovered in petitioner's apartment following the murder. Petitioner's position is that the loss of the shirt by the state constituted a *Brady* violation and had the shirt been presented at trial, it would have corroborated petitioner's statement that the shirt had been left behind by one of three assailants who petitioner avers murdered the victim.

[1, 2] A *Brady* violation is normally predicated on the defendant's not knowing of the withheld evidence. Where defendant is aware of the evidence before or during trial, the appropriate action is a motion to compel discovery or a motion to dismiss. Petitioner became aware of the loss of the shirt during trial and moved to dismiss based on its loss. Although there is a possibility that admission of the shirt might have helped the defense, we are not persuaded that failure to raise the issue on appeal constitutes ineffective assistance of counsel. The facts of the case show that the murder occurred in petitioner's apartment, that the shirt was in a bathroom sink, and that there was evidence that petitioner had, at least partially, changed his clothes and attempted to clean himself prior to the arrival of the police. Under these circumstances, and in view of other evidence that petitioner committed the murder, the trial court's denial of his motion to dismiss predicated upon the state's admitted loss of the shirt is not such that failure to appeal its denial amounts to ineffective counsel.

[3] Petitioner also claims that the trial judge improperly considered a non-statutory aggravating factor which was not supported by any evidence. The basis for this claim is in the trial judge's finding of fact relative to aggravating circumstances:

> (H) That the murder of which the defendant has been convicted was especially heinous, atrocious or cruel. That the record amply shows that the defendant did beat the victim, Jario-Arango Posada, with a blunt instrument many times about his head and body, causing deep lacerations and tremendous bleeding; that the victim was struck severely between his legs, almost severing his sexual organ; that the defendant placed television remote control wire around the victim's neck choking him and balled up a towel and stuffed it into his throat, blocking his air passages; that after severe beating and strangulation, two gunshot wound were placed in the victim's head. The record further shows that the defendant acted in a premeditated, senseless and cruel manner that is indicative of the unreasonable, unlawful and violent nature of this defendant in the especially heinous, atrocious murder of Jario-Arango Posada.

Petitioner urges that the last sentence of the quote is a separate non-statutory aggravating circumstance bearing on petitioner's conduct prior to the murder and that failure to raise this issue on appeal constituted ineffective assistance of counsel. We disagree. The sentence bears on the judge's finding that the murder was especially heinous, atrocious, or cruel and contains no error. We have previously affirmed the death sentence on direct appeal based on a finding of a single aggravating circumstance, especially heinous, atrocious, or cruel. *Arango* at 174–75. There was no ineffective assistance of counsel for failure to

rarse the issue. *See Thomas v. State*, 421 So.2d 160 (Fla.1982).

APPEAL (3.850 MOTION)

[4] Appellant urges that the trial court erred in denying his motion: (1) in the face of uncontradicted evidence that the state failed to preserve exculpatory evidence, (2) in view of the thirteen substantive issues raised by appellant; and (3) without an evidentiary hearing or without attaching the portion of the files and records conclusively showing that appellant was not entitled to relief.

On point one, we have previously noted that the state's failure to preserve the allegedly exculpatory evidence, a bloody yellow shirt, was known to appellant during the course of the trial and that the trial court denied appellant's motion to dismiss based on the state's loss of the evidence.

On point two, the record reflects that all of the thirteen substantive issues raised by appellant were either raised, or could have been raised, on appeal. Thus, neither points one nor two present issues appropriate for rule 3.850 challenges. *See Raulerson v. State*, 420 So.2d 567 (Fla.1982).

Point three merits discussion. On January 3, 1983, appellant's counsel filed an unverified motion for post-conviction relief. Said motion was scheduled for hearing on March 9, 1983, but was indefinitely postponed at the request of appellate counsel until she could obtain verification by appellant. The delay in obtaining verification was attributed to a language barrier. (Appellant speaks only Spanish.) On April 6, 1983, the Governor signed a warrant directing that appellant be executed during the week of April 29, 1983. Thereafter, appellant's counsel filed an amendment to the motion for post-conviction relief and ancillary motions seeking a declaration of indigency, appointment and payment of a translator, experts (attorneys), investigators, and counsel, a stay of the execution, and an evidentiary hearing. Appellant was transported to Dade County and a hearing scheduled for April 21, 1983. On that date, appellant verified his motion for post-conviction relief.

At the rule 3.850 hearing, presided over by the original trial judge, appellant maintained that his ancillary motions should first be granted. The trial judge declined to do so until appellant came forth with preliminary evidence that the claimed ineffective assistance of counsel did not result from trial strategy and tactics. Despite the presence at court of the former, allegedly ineffective, counsel, subpoenaed by the state, and contrary to the suggestion of the state and the court, appellant refused to call former counsel and objected to the state doing so. Appellant's position was that he was not prepared for an "evidentiary" hearing on his motion for post-conviction relief and could not prepare for such hearing unless his ancillary motions were granted. Having reached impasse, the trial judge reviewed the standards for post-conviction relief from *Knight v. State*, 394 So.2d 997 (Fla.1981), and ruled that appellant had not supported his motion.

We have reviewed the various points raised by appellant in his motion for post-conviction relief, as amended, and agree with the trial judge that the specific omissions or overt acts are either explainable on their face as trial tactics or do not otherwise show ineffective assistance of counsel. Appellant met the first prong of the four-part test set forth in *Knight* by detailing the specific omission or overt act on which his claim was based, but failed entirely "to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel." *Id.* at 1001.

[5] Appellant is apparently laboring under a misapprehension of his burden under *Knight* and the purpose of a rule 3.850 hearing. When a motion for post-conviction relief is filed, the presiding judge may: (1) determine that the motion itself is legally insufficient and deny the motion without a hearing; (2) determine that the files and records in the case conclusively show that the prisoner is entitled to no relief and deny the motion without a hearing, attaching a copy of the portion of the files and records

conclusively showing no entitlement to relief; or (3) determine that a hearing is required for disposition of the motion.

[6] In the instant cause appellant was afforded a hearing but complains that it was illusory and unduly restrictive because of the judge's refusal to first grant his ancillary motions. Appellant's counsel refused to put on any preliminary evidence to support either the motion for post-conviction relief or the ancillary motions, despite the fact that both the appellant and the allegedly ineffective former counsel were present and available. We approve the trial judge's determination that preliminary supporting evidence was necessary before he could realistically consider granting the various ancillary motions. The burden was on the appellant to support his pending motions. We, of course, have no opinion as to what the trial judge might have ruled had appellant or appellant's former counsel been called to testify, but the judge cannot be faulted for appellant counsel's tactical decision not to use the hearing to present probative evidence.

[7] We also take this opportunity to comment on what we consider to be the all too frequent and questionable practice of waiting until the eleventh hour to raise or prosecute issues which could have and should have been raised months or years before. The unverified motion for post-conviction relief was filed on January 3, 1983. The four-month delay in verifying the motion and scheduling it for hearing until just prior to the scheduled execution week can be described at best as dilatory and, at worst, as an abuse of process. Essentially, appellant appeared at the April 21, 1983, hearing unprepared to carry the *Knight* burden, demanding instead that he be granted a stay of execution and the appointment of investigators and experts in the speculative expectation that he might be able at some unknown future date to develop evidence to support the motion for post-conviction relief. We condemn such tactics as unworthy of the legal profession. *Spenkelink v. Wainwright*, 372 So.2d 927 (Fla.1979) (Alderman, J., concurring specially).

[8] Appellant also urges that the trial judge erred in failing to attach portions of the files and records conclusively showing that the appellant was entitled to no relief. Such attachment is only required if no hearing is held. Petitioner was granted a hearing. The motion was denied after the hearing at which petitioner failed to either meet prong two, or three, of *Knight* or to support his ancillary motions for a stay of the execution and additional time and resources. We have reviewed the transcript of the hearing and find it comports with due process.

APPLICATION FOR EXTRAORDINARY RELIEF

We see no merit in petitioner's argument that imposition of the death penalty on him would violate international law.

[9] At trial, petitioner testified that he and the victim were overpowered by three assailants who murdered the victim and fled prior to the arrival of the police. Petitioner now urges that he has recently discovered, on approximately April 23, 1983, that a semi-automatic pistol was found on the day following the murder under the balcony of petitioner's apartment, and was turned over to the police investigating the murder. Petitioner urges that this evidence was exculpatory and that the state failed to produce this evidence despite his discovery motion which specifically requested, inter alia:

> 3. Any physical evidence or witness statements which corroborate the Defendant's statements to Detective Diaz that other Latin males entered the apartment and committed the homicide.

The state acknowledges that it did not make petitioner aware of this evidence but maintains that the pistol was unrelated to this case and, thus, was not disclosed. We express no views on the merits but petitioner has made a prima facie case which requires a hearing. We remand to the trial court for the purpose of conducting a hear-

ing on the claimed *Brady* violation. Our stay of execution granted on May 2, 1983, remains in effect pending the outcome of the hearing.

It is so ordered.

ALDERMAN, C.J. and SHAW, J., concur.

McDONALD, J., concurs specially with an opinion in which OVERTON, J., concurs.

ADKINS, BOYD and EHRLICH, JJ., concur to portions of opinion denying habeas corpus and affirming denial of the 3.850 motion, but dissent to remanding for a hearing on the *Brady* violation.

McDONALD, Justice, specially concurring.

I concur in all parts of the opinion except that portion that denies an evidentiary hearing on Arango's 3.850 motion. In addition to the relief afforded Arango in the opinion, he should be authorized to present evidence of ineffective assistance of counsel at the sentencing proceeding. In addition, I would go somewhat further because I also feel that he is entitled to an evidentiary hearing on the effectiveness of counsel at the sentencing proceeding. To me this did not appear to be an appropriate death sentence case, and, had available nonstatutory mitigating circumstances been presented, others may have reached the same conclusion.

OVERTON, J., concurs.

James David RAULERSON,
Appellant/Petitioner,

v.

STATE of Florida, Appellee/Respondent.

Nos. 64181, 64182.

Supreme Court of Florida.

Sept. 1, 1983.

Defendant appealed from an order of the Circuit Court, Duval County, Clifford B. Shepard, C.J., denying his motion for post-conviction relief. Defendant also sought writ of habeas corpus and stay of execution. The Supreme Court, Adkins, J., held that: (1) by accepting court's proposal that he act as cocounsel in resentencing hearing, defendant had opportunity to participate in hearing as counsel and result was same as if he represented himself; (2) where defendant was removed as cocounsel during resentencing hearing, but made no objection, defendant did not make an unequivocal demand to represent himself; (3) since defendant was afforded a resentencing, claim of ineffective assistance of counsel at original sentence would not lie; (4) counsel for defendant was both effective and prepared at resentencing hearing; (5) in view of fact that defendant never unequivocally asserted his right to self-representation and was given right to participate as cocounsel in resentencing hearing, counsel representing him on appeal from resentencing could not be faulted for not raising issue of self-representation on appeal, and thus defendant was not entitled to habeas corpus relief on basis of ineffective appellate assistance of counsel.

Affirmed, writ denied, stay of execution denied.

1. Criminal Law ⇐641.10(3)

By accepting court's proposal that he act as cocounsel at resentencing hearing, defendant had an opportunity to participate in hearing as counsel and result was same

SPENCER D. MERCER
CLERK

United States Court of Appeals
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

IN REPLYING, GIVE NUMBER OF CASE AND NAMES OF PARTIES

August 12, 1983

TO ALL COUNSEL OF RECORD:

RE: 83-5421
ARANGO, ETC. vs. WAINWRIGHT
District Court No. 83-1077-Civ-EPS

Dear Counsel:

The Court has directed that an expedited briefing schedule be issued in the above referenced case. Therefore, the briefing schedule which issued from our office on August 1, 1983, is hereby RECALLED.

The following schedule should be strictly adhered to; briefs should be filed in our office on the date given:

Appellant's brief should be filed on or before August 26, 1983.

Appellee's brief should be filed on or before September 9, 1983.

The case is being tentatively scheduled for the week of September 26, 1983, in Miami, Florida. Counsel will be advised as to the exact time and date of argument by the calendaring section of our office within the next few days.

This letter will confirm my conversation with attorneys Sharon B. Jacobs, attorney for appellant, and Carolyn Snurkowski, Chief, Florida Attorney General's office in Miami, as counsel for appellee in the absence of Penny H. Brill.

Very Truly Yours,

SPENCER D. MERCER, Clerk

Kembra L. Smith

Kembra L. Smith, Deputy Clerk

CC: Ms. Sharon B. Jacobs
Ms. Carolyn Snurkowski
Ms. Penny H. Brill

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

LUIS CARLOS ARANGO, a/k/a, CARLOS LUIS ARANGO,	)	
Appellant,	)	
vs.	)	CASE NO.: 83-5421
LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,	)	
Appellee.	)	

MOTION TO HOLD THESE APPELLATE PROCEEDINGS IN ABEYANCE; OR TO REMOVE THE CAUSE FROM EXPEDITED REVIEW SCHEDULE

Appellant, Luis Carlos Arango, through undersigned counsel, moves this Court to hold these appellate proceedings in abeyance pending the resolution of Ford v. Strickland by the United States Supreme Court, or to remove the cause from the expedited review schedule, and states:

1. Appellant's brief would normally be due on September 12, 1983. Appellant has been advised by the Clerk of this Court that this cause has been placed on an expedited schedule so that Appellant's brief must now be filed two (2) weeks earlier, on August 26, 1983 and that oral argument is scheduled during the week of September 26, 1983.

2. In Barefoot v. Estelle, No. 82-6080 (U.S. July 6, 1983) [51 LW 5189], the Supreme Court recently considered the circumstances under which a Federal Appellate Court may deny a stay of execution pending appeal and expedite the appellate proceedings. The

Supreme Court held that where a federal court is faced with the prospect of preventing a state from going forward in the execution of a state court order for the death of an inmate, under narrow circumstances, the appellate court has the power to expedite the appellate proceedings.

3. The status of the instant cause distinguishes it from that in Barefoot. First, there is no death warrant in effect for Mr. Arango. Moreover, the Florida Supreme Court has precluded the Governor of Florida from signing a death warrant because on May 2, 1983, the Florida Supreme Court entered an order staying the execution of Mr. Arango pending resolution of the causes before that Court, Case Nos. 63,562; 63,563 (said Order is attached hereto as Exhibit "A"). No further order has issued from that Court to date. The appeal herein concerns issues distinct from those now pending before the Florida Supreme Court.

4. Under the circumstances of the present cause, no argument of compelling state interests can be made to justify expediting the appellate proceedings. Mr. Arango's counsel should be allowed the same length of time within which to research and prepare briefs on the complex constitutional issues which will ultimately determine whether a human life is extinguished, as the Federal Rules of Appellate Procedure generally afford counsel to prepare briefs involving commercial matters. Likewise this Court should not be rushed to review the briefs and lengthy record prior to oral argument. The Supreme Court in Barefoot v. Estelle supra., did not contemplate the across-the-board practice of expediting all capital cases where no death warrant was in effect.

5. Not only is there no rational reason for this Court to expedite the appellate proceedings, but rather, it would be in the best interest of judicial economy to hold in abeyance these appellate proceedings, including the filing of briefs. Mr. Arango was one of the 123 class action petitioners in the case of Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), cert. den., challenging the ex parte receipt, review and consideration of non-record material by the Florida Supreme Court Justices in the course of their review of capital punishment cases. This Court recently considered that issue in Ford v. Strickland, 696 F. 2d 804 (11th Cir. 1983) (en banc). A petition for writ of certiorari has been filed in that case, Ford v. Strickland, No. 82-6923 (U.S. June 14, 1983).

Mr. Arango raises, inter alia, a simlilar issue in the instant case. Mr. Arango did raise an additional ground which requires that his sentence be vacated based upon the alleged ex parte practices of the Florida Justices which ground was apparently not raised by the Appellant in the Ford case. Here Mr. Arango alleges that even if the Florida Justices did not rely upon certain tainted non-record material, that the appearance of impropriety is so great that it requires the reversal of Mr. Arango's sentence in order to preserve the public trust and respect for the judicial system. However, a determination by the United States Supreme Court of Ford v. Strickland may be decisive of the instant appeal.

6. A second issue raised in this appeal by Mr. Arango concerns a Whitherspoon violation in the excusal of prospective jurors for cause. The nature of the facts here are similar to those considered by this court in its 5-5 decision in Darden v. Wainwright, 699 F. 2d 1041 (11th Cir. 1983) reh'g den. (en banc), which case is presently

pending on Motion for Reconsideration.

7. If this cause is briefed and argued before the Ford and Darden decisions are finally resolved, this case will undoubtedly require additional briefing and subsequent oral argument.

8. The Attorney General's office has been contacted and Penny Brill, Assistant Attorney General has authorized undersigned to represent that the Appellee has no objection to the removal of this cause from the expedited review schedule because of the proceedings before the Florida Supreme Court. The State takes no position regarding the Motion to Hold These Appellate Proceedings in Abeyance and will not be filing any response.

WHEREFORE and by reason of the foregoing, Appellant, Luis Carlos Arango, requests this Court Hold in Abeyance these Apellate Proceedings, including briefing, pending final resolution of Ford and Darden.

Respectfully submitted,
CHAYKIN, KARLAN & JACOBS
Attorneys for Appellant
114 Giralda Avenue
Coral Gables, Florida 33134
(305) 446-1220

By Sharon B. Jacobs
SHARON B. JACOBS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was mailed to Penny Brill, Assistant Attorney General, The Office of the Attorney General of Florida, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida , 33128, this 15th day of August, 1983.

By Sharon B. Jacobs
SHARON B. JACOBS

IN THE SUPREME COURT OF FLORIDA

MONDAY, MAY 2, 1983

CARLOS LUIS ARANGO, ETC.,	**	
Petitioner,	**	
vs.	**	CASE NO. 63,563
LOUIE L. WAINWRIGHT,	**	
Respondent.	**	
** ** ** ** ** ** ** ** **		
CARLOS LUIS ARANGO, ETC.,	**	
Appellant,	**	
vs.	**	CASE NO. 63,562
STATE OF FLORIDA,	**	
Appellee.	**	
** ** ** ** ** ** ** ** **		

The Application for Stay of Execution is granted and the execution of Carlos Luis Arango is hereby stayed pending disposition of these proceedings.

ALDERMAN, C.J., OVERTON, McDONALD and SHAW, JJ., Concur
ADKINS, BOYD, and EHRLICH, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

cc: Sharon B. Jacobs, Esquire
of Chaykin, Karlan & Jacobs
Penny Hershoff Brill, Esquire
Superintendent C. G. Strickland, Jr

"A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-5421

CORRECTED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
AUG 24 1983
SPENCER D. MERCER
CLERK

LUIS CARLOS ARANGO, a/k/a
CARLOS LUIS ARANGO,
Florida Inmate No. 075042,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

O R D E R:

IT IS ORDERED that appellant's motion to hold these appellate proceedings in abeyance is DENIED.

IT IS FURTHER ORDER that appellant's motion to remove cause from expedited review schedule is DENIED.

s/s PAUL H. RONEY
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

SPENCER D. MERCER
CLERK

IN REPLYING, GIVE NUMBER OF CASE AND NAMES OF PARTIES

September 6, 1983

TO ALL COUNSEL OF RECORD

RE: 83-5421
ARANGO, ETC. vs. WAINWRIGHT
District Court 83-1077-Civ-CA

Dear Counsel:

The Court has recently learned of an opinion rendered by the Florida Supreme Court involving the above referenced appellant.

Counsel should advise the Court immediately as to the impact of the Florida Supreme Court opinion on the above referenced appeal and whether oral argument would now be appropriate.

Very truly yours,

SPENCER D. MERCER, Clerk

Kembra L. Smith

Kembra L. Smith, Deputy Clerk

CC: Ms. Sharon B. Jacobs
Ms. Penny H. Brill

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

LUIS CARLOS ARANGO, a/k/a, CARLOS LUIS ARANGO, Petitioner/Appellant, vs. LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent/Appellee.	CASE NO.: 83-5421 APPELLANT'S STATUS REPORT Re: Expedited Oral Argument Scheduled for Sept. 26, 1983

Petitioner/Appellant, Luis Carlos Arango, through undersigned counsel, and pursuant to this Court's Order of September 6, 1983, files the following Status Report:

1. This court sua sponte has ordered the above captioned cause expedited. Oral Argument is scheduled for September 26, 1983 at 1:30 p.m.

2. On September 6, 1983, this Court requested counsel to advise the Court as to the impact on the above captioned cause of the Florida Supreme Court's opinion rendered on September 1, 1983, in Arango v. State and Arango v. Wainwright, Case Nos. 63,562;63,563 ___So.2d___, 8 FLW 316 (Fla. Sept. 1, 1983), and as to whether oral argument would now be appropriate.

3. All of the issues considered by the court below and now on appeal in the above captioned cause were previously exhausted in state court and were not the subject of the Florida Supreme Court's recent opinion of September 1, 1983. Therefore, the recent Supreme Court opinion does not present any new ruling on those issues which would legally preclude this Court from continuing with the present expedited oral argument schedule.

4. Appellant, however, takes this oportunity to point out the consequences of the recent Florida Supreme Court decision which may cause this court to remove this appeal from the expedited oral argument schedule for policy reasons.

5. The Florida Supreme Court granted Mr. Aango's request for a hearing to determine whether he is entitled to a new trial based upon the discovery of the allegedly exculpatory evidence of a third gun, which the state failed to disclose to Mr. Arango at the time of trial despite appropriate defense requests. See 8 FLW at 317. The Supreme Court remanded the case back to the trial court for the purpose of conducting on evidentiary hearing on the claimed Brady 1/ violation. The Court continued its stay of execution that was granted May 2, 1983, pending the outcome of that hearing.

6. Appellant first points out that if Mr. Arango prevails in the trial court on the Brady violation he will be entitled to a new trial which would render moot the above captioned proceedings in this Court. Even if Mr. Arango does not prevail on this issue in the trial court, he is entitled to appeal that issue to the Florida Supreme Court as of right. In the interest of comity and federalism, this Court may want to remove this cause from the expedited schedule.

7. In its recent opinion the Florida Supreme Court also considered several other issues. The Court denied Mr. Arango's Petition for Writ of Habeas Corpus which asserted ineffective assistance of appellate counsel, and affirmed the denial of the Motion for Post Conviction Relief made, pursuant to Fla. R. Crim. Pro. 3.850, which asserted, inter alia, ineffective assistance

---

1/ Brady v. Maryland, 373 U.S. 83 (1963).

of trial counsel. Justices McDonald, joined by Justice Overton, specially concurred with the opinion except that portion that denied an evidentiary hearing on Mr. Arango's 3.850 motion, stating:

> I concur in all parts of the opinion except that portion that denies an evidentiary hearing on Arango's 3.850 motion. In addition to the relief afforded Arango in the opinion, he should be authorized to present evidence of ineffective assistance of counsel at the sentencing proceeding. To me this did not appear to be an appropriate death sentence case, and, had available nonstatutory mitigating circumstances been presented, others may have reached the same conclusion.

8 FLW at 317-18.

8. In the event that Mr. Arango does not prevail on the Brady violation issue, then a petition for writ of habeas corpus would, in all likelihood, be filed in federal court on the denial of the Fla. R. Crim. Pro. 3.850 motion regarding ineffective assistance of trial counsel.

9. Appellant advises this Court of these future procedures only to allow this Court to make a well advised decision as to whether it is in the best interest of the efficient administration of justice to expedite the oral argument in this cause.

10. Appellant further takes this opportunity to bring to this Court's attention its recent Order in Darden v. Wainwright, No. 81-5590 (11th Cir. Sept. 1, 1983), vacating its en banc opinion and scheduling reconsideration without oral argument during the week of September 12, 1983. In the instant appeal, Mr. Arango raises as issue number I of his brief that he should be granted habeas corpus relief on the grounds that the mandate of Witherspoon v. Illinois, 391 U.S. 510 (1968) was violated by the exclusion for cause of a prospective juror who did not make it unmistakably clear that his attitude toward the death penalty would prevent him from impartially

deciding guilt or innocence. This Court will consider, en banc, a similar Witherspoon issue in the Darden case. A decision in Darden may necessitate additional briefs in this case.

11. Based on the foregoing it is the Appellant's position that instant appeal should be removed from the expedited oral argument calendar. This position is not taken for the purpose of delay, but rather, as a practical matter, since there is a strong liklihood of success in the state court proceeding, which will occur as quickly as possible, this appeal may soon be moot. There is no compelling interest for the federal court to expedite the matter where the state court has remanded a collateral matter to the state trial court for resolution.

Respectfully submitted,

CHAYKIN, KARLAN & JACOBS
Attorneys for Appellant
114 Giralda Avenue
Coral Gables, Florida 33134
(305) 446-1220

By: Sharon B. Jacobs
SHARON B. JACOBS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed this 13th day of September, 1983, to Penny Brill, Esquire, The Office of the Attorney General of Florida, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128.

By: Sharon B. Jacobs
SHARON B. JACOBS

RECEIVED SEP 8 1983

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

LUIS CARLOS ARANGO,
a/k/a CARLOS LUIS ARANGO,

Petitioner/Appellant,

vs. CASE NO, 83-5421

LOUIE L. WAINWRIGHT
Secretary, Florida Department
of Corrections,

Respondent/Appellee.

STATUS REPORT

Respondent/Appellee, LOUIE L. WAINWRIGHT, by and through his undersigned counsel, pursuant to this Court's oral order of September 6, 1983, files the following Status Report:

1. On September 1, 1983, the Florida Supreme Court issued its opinion in Carlos Luis Arango v. State and Carlos Luis Arango v. Wainwright, Case Nos. 63, 562; 63, 563, which concerned the defendant, Carlos Luis Arango's appeal from the trial court's denial of his motion for post conviction relief which alleged among other allegations, ineffective assistance of trial counsel, and as well a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel. The Florida Supreme

Court also considered and decided the issues raised in the defendant's application for extraordinary relief.

2. The Florida Supreme Court in its opinion denied the petition for writ of haveas corpus, affirmed the denial of the motion for post conviction relief, but remanded the case back to the trial court for an evidentiary hearing on a claimed Brady[1] violation which was alledgedly discovered after the trial court had considered the motion for post conviction relief.[2] The Florida Supreme Court expressed no views on the merits, but continued its stay of execution that was granted on May 2, 1983, pending the outcome of the hearing. The Respondent/Appellee is attaching a copy of the Florida Supreme Court's opinion in case Nos. 63,562; 63,563.

3. The Petitioner/Appellant's appeal from the district court's denial of his petition for writ of habeas corpus is now pending before this Court in the above styled cause. This Court has expedited the appeal on its own motion. The Petitioner/Appellant has filed his brief in the instant cause. The Respondent/Appellee will be filing its brief on September 9, 1983. Oral argument is

1 Brady v. Maryland, 373 U.S. 83 (1963).

2 This was one of the issues in the Application for Extraordinary Relief.

presently scheduled for Monday, September 26, 1983, at 1:30 p.m., in Miami, Florida.

4. The issues presented in the federal petition, and on this appeal involve only those issues initially raised by the Petitioner/Appellant in his direct appeal to the Florida Supreme Court. The instant case does not involve any issues that was the subject matter of the Florida Supreme Court's opinion of September 1, 1983.

5. The Respondent/Appellee and the State of Florida have at this time, no plans to file for rehearing in the Florida Supreme Court. It is the State of Florida's position to proceed with the hearing ordered on remand as quickly as possible. It is also the Respondent/Appellee and the State of Florida's position that at this time, because the issues have already been extensively briefed, that this Court continue with the present appeal in an expedited manner.

Respectfully submitted,

JIM SMITH
Attorney General

PENNY H. BRILL
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue - Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forefoing STATUS REPORT was furnished by mail to Sharon B. Jacobs, Esquire, Chaykin, Karlan and Jacobs, 114 Giralda Avenue, Coral Gables, Florida 33134, on this 7 day of September, 1983.

PENNY H. BRILL
Assistant Attorney General

PHB/hu

-ATTACHMENT TO STATUS REPORT OMITTED-

(See A.9-15 for attachment.)

United States Court of Appeals
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

SPENCER D. MERCER
CLERK

September 20, 1983

TO ALL COUNSEL OF RECORD

No. 83-5421 - Luis Carlos Arango v. Louie L. Wainwright

This will confirm that the above appeal has been continued from the oral argument calendar on Monday, September 26, 1983, in the Central Courtroom in Miami, Florida, and counsel need not appear on this specified date.

Sincerely,

SPENCER D. MERCER, Clerk

By _____
Calendar Clerk

/bjc

Sharon B. Jacobs, Esq.
Penny H. Brill, Esq.

EDITOR'S NOTE

PAGES A35 - A46 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

and that his impairments did not prevent him from returning to his former occupation as a plant manager.

In addition, as directed by the Court's remand order, a vocational expert testified at the rehearing. He classified plaintiff's plant manager work as professional and involving supervisory skills. The other employments he viewed as primarily unskilled. Based on the assumptions that plaintiff's impairment did not restrict his capability for intellectual understanding and functioning, or his physical movements, the expert listed a number of jobs of a sedentary and entry level nature that plaintiff could perform without prior formal training. These were cashier, general office work, record keeping, etc., checker, examiner, packer-wrapper, assembler, filer, polisher, machine operator or automatic machine tender, the latter requiring only the pushing of buttons or pressing a lever. This list, the expert stated, was representative rather than exhaustive, and was based upon the wide availability of such jobs as described in the latest Census of Population. Tr. II, 330-33. Plaintiff acknowledged that there were "many, many machines" in the cosmetics plant he supervised for two or three or more years after he had his gastrectomy. Tr. II, 333; Tr. I, 110.

[4] However much one may sympathize with plaintiff's distress, the evidence of record would not warrant reversal of the Secretary's reconsidered decision denying benefits. The record amply reveals that plaintiff's condition causes him no pain, does not interfere with his recreational activities or diminish his physique. The VA treating doctors have constantly reminded him that he can relieve his distress by strict adherence to a high protein, low carbohydrate diet and elimination of dairy products. The substantial evidence supports the Secretary's determination that plaintiff is not disabled from pursuing any gainful activity, and his decision is affirmed.

SO ORDERED.

Luis Carlos ARANGO a/k/a Carlos Luis Arango, Florida Inmate No. 075042, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent.

No. 83-1077-CIV-EPS.

United States District Court, S.D. Florida, Miami Division.

May 6, 1983.

Petition for writ of habeas corpus was filed by state prisoner. The District Court, Spellman, J., held that: (1) Florida Supreme Court's mere request for and receipt of information referred to in state court habeas corpus proceeding relating to other death row inmates did not create appearance of impropriety tainting entire pool of inmates bringing habeas corpus proceeding, and particularly defendant, in perpetuity; (2) excusal for cause of prospective juror whose ability to perform as a juror was substantially impaired by attitude toward death penalty did not deny defendant right to a fair trial by an impartial jury; (3) any error in admission of testimony of medical examiner as to feelings experienced by dying victim was harmless; and (4) Florida state courts acted through a properly drawn capital punishment statute with appropriate standards to guide discretion, and exercised discretion with care and concern, when aggravating circumstance that murder was "especially heinous, atrocious or cruel" was found to outweigh mitigating circumstance of defendant's lack of prior criminal activity, meriting penalty of death.

Petition denied and stay of execution vacated.

1. Habeas Corpus ⇐39(3)

In light of Florida Supreme Court's statement, in habeas corpus proceeding in

which defendant joined with other death row inmates in alleging that court had a practice of reviewing ex parte nonrecord information concerning capital defendants' mental health and personal background, that view of nonrecord information would be totally irrelevant to court's role in sentence review, and in light of further indication by court that such information was used for some other purpose, mere request for and receipt of information referred to in habeas corpus proceeding relating to other death row inmates did not create appearance of impropriety tainting entire pool of inmates bringing habeas corpus proceeding, and particularly defendant, in perpetuity.

2. Jury ⇐33(2.1)

Excusal for cause of prospective juror whose ability to perform his duties as a juror in a capital case were substantially impaired by his attitude toward death penalty did not deny defendant his right to a fair trial by an impartial jury.

3. Criminal Law ⇐778(5)

Instruction during penalty phase of capital case that made it clear that jury must find that aggravating circumstances outweigh mitigating circumstances did not unconstitutionally shift to defendant burden of proving that mitigating circumstances outweighed aggravating circumstances. U.S.C.A. Const.Amends. 5, 8, 14.

4. Habeas Corpus ⇐96

Whether medical examiner's testimony during sentencing phase of capital case with respect to feelings experienced by dying victim was irrelevant, prejudicial and inflammatory was a state evidentiary question and beyond scope of review by federal court in considering issue on habeas corpus petition.

5. Habeas Corpus ⇐25.1(8)

In analyzing "fundamental fairness" of a criminal trial, erroneous admission of prejudicial evidence can justify habeas corpus relief if it is material in sense of a crucial, critical and highly significant factor.

6. Criminal Law ⇐1177

Any error in admission, at penalty phase of capital case, of medical examiner's testimony as to feelings experienced by dying victim was harmless where it was clear that medical examiner's opinions were based on scientific analysis and any reference he made to his personal experiences served only to amplify his medical findings for jury.

7. Criminal Law ⇐986.6(1)

In light of trial court's defining individually each term of instruction on "especially heinous, atrocious, or cruel" aggravating circumstances, instruction, given during penalty phase of capital case, was neither vague, incomplete nor inadequate.

8. Homicide ⇐354

Florida state courts acted through a properly drawn capital punishment statute with appropriate standards to guide discretion, and exercise of discretion was accomplished with care and concern, when aggravating circumstance that murder was "especially heinous, atrocious or cruel" was found to outweigh single mitigating circumstance of defendant's lack of prior criminal activity, meriting penalty of death. West's F.S.A. § 921.141.

9. Habeas Corpus ⇐96

Scope of federal court review of Fourth Amendment issue of search and seizure on a habeas corpus petition filed by a state prisoner is limited to a finding of whether prisoner was afforded an opportunity to fully and fairly litigate his claim in state court. U.S.C.A. Const.Amend. 4.

10. Habeas Corpus ⇐45.1(4)

Where identical Fourth Amendment search and seizure issue was fully and fairly litigated during state court proceeding in a motion to suppress hearing, denial of which was affirmed by Florida Supreme Court, state prisoner was precluded from raising issue before federal habeas court. U.S.C.A. Const.Amend. 4.

Sharon B. Jacobs, Chaykin, Karlan & Jacobs, Coral Gables, Fla., for petitioner.

UNIVERSITY OF MIAMI LAW LIBRARY

Penny Brill, Asst. Atty. Gen. of Florida, Miami, Fla., for respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, VACATING STAY OF EXECUTION AND MEMORANDUM OPINION

SPELLMAN, District Judge.

THIS CAUSE came before the Court on Petition for Writ of Habeas Corpus filed on behalf of Petitioner, LUIS CARLOS ARANGO a/k/a CARLOS LUIS ARANGO (Arango) pursuant to Title 28, United States Code, Section 2254. Arango raised several constitutional grounds for relief. However, this Court finds no merit in Arango's petition and, therefore, it is dismissed. Moreover, in light of this decision dismissing the petition for writ of habeas corpus, the stay of execution heretofore entered on April 27, 1983 is vacated.

I. BACKGROUND

Arango was convicted in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, of first degree murder and possession of a controlled substance. Petitioner was sentenced to death by electrocution on the first degree murder conviction, and to a term of five (5) years imprisonment in the state penitentiary on the conviction for possession of cocaine, this latter sentence to run concurrently.

On direct appeal to the Florida Supreme Court, Arango raised the following issues: that the trial court improperly denied his motion to suppress evidence obtained as the result of an unlawful, warrantless entry into his apartment; that the trial Court's instruction to the jury at the penalty phase unconstitutionally shifted to him the burden of proving that the mitigating circumstances outweighed the aggravating circumstances; that the trial court's instruction of the "especially heinous, atrocious or cruel" aggravating circumstances was inadequate and the trial court refused to give instructions properly defining these terms; that the trial court erred in allowing the prosecution to introduce the irrelevant and inflamatory testimony of the medical examiner to prove the applicability of the terms heinous, atrocious or cruel; that the death penalty was a disproportionate punishment; and that the trial court improperly excused a venireman for cause over defendant's objection in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The Florida Supreme Court affirmed both the convictions and the sentence. *Arango v. State*, 411 So.2d 172 (Fla. 1982), and the United States Supreme Court declined to review that decision. *Arango v. Florida*, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982).

During the pendency of Petitioner's direct appeal, Arango joined with numerous other death row inmates in filing an application for extraordinary relief and petition for habeas corpus based on the allegation that the Florida Supreme Court had a practice of reviewing *ex parte*, non-record information concerning capital defendants, mental health and personal background. The Supreme Court of Florida denied relief, *Brown v. Wainwright*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).[1]

Governor Graham signed Arango's death warrant on April 6, 1983. Pursuant to this warrant, the execution was to be scheduled "some day of the week beginning noon, Friday, the 29th day of April, 1983, and ending noon, Friday, the 6th day of May, 1983...."

1. Although it is not before this Court, it should be noted that Arango filed a motion for post-conviction relief in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, pursuant to Fla.R.Crim.P. 3.850. Arango has appealed the denial of his motion for post-conviction relief and has filed a petition for writ of habeas corpus in the Florida Supreme Court. Oral argument has been scheduled for the appeal and the petition for May 2, 1983 at 9:30 a.m. Of course, the issues raised in the motion for post-conviction relief and the petition for writ of habeas corpus now pending oral argument before the Florida Supreme Court are not the subject of the Petition for Writ of Habeas Corpus at issue before this Court to which this opinion directs itself.

On April 27, 1983, a Petition for Writ of Habeas Corpus, Application for Stay of Execution and Motion for Continuance was filed on behalf of Arango in the United States District Court, Southern District of Florida.[1] This Court immediately held a hearing. Counsel for Arango indicated to this Court that although the execution is scheduled for 7:00 a.m., May 3, 1983, the Superintendent of Prisons has the authority to execute Arango at any time subsequent to April 29, 1983. Counsel further indicated that an application for stay of execution was denied by the Florida Supreme Court.

Because of this Court's concern over the possibility of the Superintendent of Prisons exercising his authority before all the issues in this Petition could be addressed, this Court granted the application for stay of execution until 6:59 a.m., May 3, 1983. This stay was in no way intended to interfere with any pending state court matters and to this Court's knowledge it does not. However, this Court further indicated that, if it becomes necessary, upon the filing of any additional petition for writ of habeas corpus subsequent to oral argument before the Florida Supreme Court on May 2, 1983, an immediate hearing would be convened.

On April 30, 1983, this Court conducted a full hearing on all the issues raised in Arango's Petition for Writ of Habeas Corpus including an evidentiary hearing on the issue that has come to be known as the *Ford v. Strickland* issue, *infra*, (*see also Brown v. Wainwright*, *supra*). All the issues that were presented to this Court for review had been presented to the Florida Supreme Court either on direct appeal or by petition for writ of habeas corpus. Therefore, this Court found and the State stipulated, that Arango had exhausted all of his state court remedies for the purpose of the present petition for writ of habeas corpus and regardless of the petition for writ of habeas corpus and appeal pending before the Florida Supreme Court, this Court was not presented with a mixed habeas corpus petition. *See Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

As heretofore noted, this Court finds no merit to Arango's Petition. Arango raised basically six (6) constitutional errors in the State court. These alleged constitutional errors were fully and fairly reviewed by this Court and found to contain no merit.

II. ANALYSIS

A. THE BROWN ISSUE: NON-RECORD MATERIAL BEFORE THE FLORIDA SUPREME COURT

Arango raised as the first ground of this Petition that his constitutional rights were violated when the Florida Supreme Court requested, received and reviewed information which was not part of the trial record or the record on appeal of his case or the cases of his fellow death row inmates. In regard to this contention, Arango requested this Court to conduct an evidentiary hearing. Over the objection of the Attorney General, this Court granted the evidentiary hearing and the exhibits attached to Arango's Petition for Writ of Habeas Corpus were accepted into evidence. These exhibits consist of the Petition for Writ of Habeas Corpus in *Brown v. Wainwright* and other various exhibits such as the appendices to the Petition and other exhibits referencing the Clerk of the Florida Supreme Court's requesting and receiving non-record material.

Arango next requested to take the testimony of the Clerk and staff of the Florida Supreme Court regarding two areas: (1) the possibility that the requested records had not been destroyed as asserted in the *Brown* petition and (2) whether with regard to Arango a request for non-record material

1. This Court conducted an emergency hearing on April 27, 1983. At that time, the Court requested the parties to provide it with a complete record of all proceedings relevant to the issues before it. Subsequent to that time, the Attorney General's office delivered to this Court the entire record of transcripts on appeal. This record contained the following exhibits: A, part I, II and III, B, C, D, E, F, G, H, I, J, K, L and M hereinafter Appendix A, B, etc. at —. The Court also received from the Attorney General's office a response to the Petitioner's Petition for Writ of Habeas Corpus.

was made regardless of no material being received. The Court denied the above request.

As to whether the requested records had been destroyed, the Court notes that Arango was a member of that group of prisoners who originally joined Brown in challenging the constitutionality of their sentences to death. On page three (3) of that original petition the last paragraph of Section III—FACTUAL BASIS FOR RELIEF—it is stated:

> Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it as alleged in the preceding paragraph, has at the Court's direction been destroyed or purged from this Court's files. As a result, it is no longer possible for petitioners to identify all of the cases in which such information was requested or received.

In addition, Petitioner's counsel admitted that no evidence exists to indicate that such records had not been destroyed as alleged.

Therefore, such a request belies the allegation made in the petition wherein the petitioner not only acknowledges that the documents were destroyed but actually alleges it.

The second area concerns whether the Clerk of the Supreme Court in fact requested non-record information. As with the first area, the Court finds such an inquiry irrelevant.

Arango claimed that the mere request of such information regardless of whether the Florida Supreme Court actually relied upon the non-record information creates the appearance of impropriety and that in capital cases where the petitioner's life is at stake, federal law guarantees petitioner a full and fair review of his death sentence free from even the appearance of impropriety. Arango contended that his fundamental right of due process of law was abridged because under the circumstances the availability to the Court of prejudicial material creates an appearance of impropriety thereby tainting the entire pool of defendants in *Brown v. Wainwright* and specifically him.

The Court finds that the above analysis defies logic. During the evidentiary hearing the following dates were proffered to the Court and accepted as accurate by Petitioner: on September 2, 1980, Arango filed his Notice of Appeal to the Florida Supreme Court on his direct appeal. The Court does not believe that the mere filing of that Notice of Appeal alerted the Justices of the Florida Supreme Court to the nature of that appeal. Twenty seven days later on September 29, 1980, the Petition for Writ of Habeas Corpus was filed in *Brown v. Wainwright*. On January 12, 1981, the Attorney General's office received the record on Arango's direct appeal and on or about that date, the Florida Supreme Court received it. Three days later on January 15, 1981, the Florida Supreme Court decided *Brown v. Wainwright*, 392 So.2d 1327 (1981).

As noted by the Eleventh Circuit in *Ford v. Strickland*, 696 F.2d 804 (1983), the Florida Supreme Court held in *Brown* that state law does not permit the use of non-record material in the appellate review of a capital sentence. *Id.* at 810. The Eleventh Circuit Court of Appeals then quoted the following passage from *Brown*:

> [A]s a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence....
>
> * * * * * *
>
> The record of each proceeding, and precedent, necessarily frame our determinations in sentence review.... Factors or information outside the record play no part in our sentence review role.

Brown v. Wainwright, 392 So.2d at 1331-1332.

On March 3, 1981, Arango filed his appellate briefs in the direct appeal and the Attorney General of the State of Florida responded on May 18, 1981. Oral argument took place on August 31, 1981. The Florida

Supreme Court decided Arango's direct appeal on January 21, 1982, more than a year after the *Brown* decision.

At the time the Court considered Arango's appeal, the *Brown* case had already been decided. This Court must assume that the Florida State Supreme Court followed *Brown* and did not review non-record information in Arango's case. In this case, not only does it appear by virtue of the dates at issue that the material was not viewed in Arango, but there has been no indication that any non-record information existed as to Arango. The exhibit offered by Petitioner in evidence clearly states that none existed.

[1] This brings the Court to the issue of whether by merely requesting and receiving the information referred to in *Brown, supra*, relating to other defendants, an appearance of impropriety was created tainting the entire pool of defendants in *Brown v. Wainwright* and particularly the Petitioner in perpetuity.

In light of the statement in *Brown, supra*, that view of non-record information would be totally irrelevant to the Court's role in sentence review, and the further indication by the Florida Supreme Court that such information was used for some other purpose, *Brown v. Wainwright*, 392 So.2d 1327, 1333 n. 17 (1981), the Court cannot find any merit with this second contention.

As to the *Ford v. Strickland* issue (*Brown v. Wainwright* in the Florida Supreme Court), the following findings of fact and conclusions of law based on the record before this Court are made:

1. That, on September 29, 1980, the date of the original application for emergency relief and petition for habeas corpus which has come to be known as *Brown v. Wainwright* and in which the Petitioner was a named Petitioner represented by counsel, said application clearly reflected that whatever material is referred to in *Brown v. Wainwright* had in fact already been destroyed by the Clerk of the Supreme Court of Florida.

2. That none of the material regardless of when destroyed contained information pertaining to the Petitioner Arango.

3. That the first occasion that the Petitioner sought direct appellate review of his capital conviction in the Supreme Court of Florida was on September 2, 1980, only twenty seven days prior to the filing of the original application and petition for habeas corpus in *Brown v. Wainwright* (which the Court already notes contained an allegation by the Petitioner that the material complained of had already been destroyed).

4. That the record on the direct appeal of the Petitioner was filed with the Florida Supreme Court on or about January 12, 1981.

5. That on January 15, 1981, the Court issued its opinion in *Brown v. Wainwright* in which it is affirmatively stated by the Court that such material was not used as asserted in the original application and petition for writ of habeas corpus.

6. That Arango's appellate brief in the direct appeal was filed with the Court on March 3, 1981 and the State's response thereto on May 18, 1981.

7. That oral argument on Petitioner's direct appeal was on August 31, 1981 and the opinion and decision of the Florida Supreme Court affirming his capital conviction issued on January 21, 1982.

8. That the sole material offered at the evidentiary hearing was the exhibit of the *Brown v. Wainwright* proceeding and the date that each of the appellate functions occurred regarding the direct appeal which dates have been stipulated to by the parties as accurate. In addition, as alluded to earlier, the Petitioner requested the opportunity of deposing the Clerk of the Florida Supreme Court or his staff for the sole purpose of determining two issues: (1) whether or not in fact such material had been destroyed (this request was denied because it belies the very allegations of the petition in the original application in *Brown v. Wainwright, supra*); and (2) whether or not any material had ever been requested by the Clerk pertaining to the Petitioner Arango although the record clearly reflects

that no such material was ever received (this the Court considered then and considers now insofar as this Court's determination to be immaterial).

9. Although this Court did not consider an evidentiary hearing essential to a determination of the issue framed in *Ford v. Strickland* (*Brown v. Wainwright*), in an abundance of caution, this Court granted such evidentiary hearing. Based upon the aforesaid findings of fact which are uncontradicted in the record, the reasons for denial of said relief on this ground are stronger than before.

10. That this Court takes judicial notice of the fact that the mere filing of a notice of appeal or a record on appeal absent a contrary showing, does not evidence any awareness or knowledge on the part of Justices of the Supreme Court of Florida as to the nature of the issues framed or the contents of said record on appeal prior to the same being presented by way of briefs or oral argument.

11. That the existence of said material as it pertains to the Petitioner and his direct appeal could have at best existed for a period of twenty seven days (September 29, 1980, date of original application; September 2, 1980, date of original notice of appeal on direct appeal).

12. That there is no evidence whatsoever to establish that whatever materials were before the Supreme Court of Florida in any form or fashion affected the decision of the Supreme Court of Florida in affirming the Petitioner's appeal one year and six days after the filing of their opinion in *Brown v. Wainwright* (January 15, 1981, *Brown v. Wainwright* opinion; January 21, 1982, affirmance opinion in direct appeal of Arango's conviction.)

13. This record is totally devoid of any facts of whatsoever kind or nature which would indicate that there was an appearance of impropriety as pertains to said Petitioner and the handling of his direct appeal by the Florida Supreme Court. This Court finds as a matter of fact and law that no such appearance existed nor was his direct appeal in any way tainted by the assertions and allegations made in the case of *Brown v. Wainwright*.

14. This Court specifically finds against the assertion by the Petitioner that there should be an inference drawn that since such material was in some form or fashion before the Supreme Court of Florida as pertains to other Defendants, that the Court should not only disregard the opinion of the Florida Supreme Court as pertains to such other defendants but in some way should draw the conclusion that this Petitioner on his direct appeal was deprived of due process of law in a full and fair consideration of his appeal by that Court. This Court does specifically find that the assertion made by said Court in their opinion in *Brown v. Wainwright* would certainly hold true and should be afforded due consideration by way of that Court subsequently deciding the appeal of an individual appellant over a year later in which no material of any kind pertaining to said petitioner was ever before said Court.[3]

Based upon the above and foregoing findings of fact and conclusions of law, the Court finds as a matter of law that the stay heretofore issued by Justice Powell of the United States Supreme Court on April 15, 1983 pertaining to the mandate in *Ford v. Strickland* has no application to the facts of this case and to the Petitioner herein.

B. THE WITHERSPOON v. ILLINOIS,[4] 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), VIOLATION

[2] Arango contends "that he was denied his right to a fair trial by an impartial

3. The Court notes that in *Booker v. Wainwright*, 703 F.2d 1251 (11th Cir.1983), the Eleventh Circuit Court of Appeals rejected Petitioner's contention that the Florida Supreme Court's solicitation of ex parte psychological material concerning Petitioner was unconstitutional. The Court *citing Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc) indicated that "Booker's attorney was furnished with the Florida Supreme Court's request of Booker's presentence investigation report, thus rendering this factual situation weaker than Ford." *Booker*, *supra*, at 1260. This Court notes that Arango's case appears even weaker than Booker's case, there being no indication that any nonrecord information whatsoever was furnished to the Florida Supreme Court.

jury drawn from a cross-section of the community when one of the venire members, Mr. Alvarez, was excused for cause in violation of the precepts of *Witherspoon v. Illinois*, 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] (1968)."

In *Witherspoon*, the Court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. at 1777.

In *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Court discussed a line of cases that established the following general proposition:

> That a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45, 100 S.Ct. at 2526.

Moreover, the law is clear that a state has the power to:

> [e]xecute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Darden v. Wainwright, 699 F.2d 1031, 1037 (11th Cir.1983), *quoting Adams v. Texas*, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980), *quoting Witherspoon v. Illinois*, 391 U.S. at 522-23, n. 21, 88 S.Ct. at 1777, n. 21 (1968).

In deciding this issue, the Court finds it necessary to examine the entire voir dire examination.[4] *Darden v. Wainwright*, 699 F.2d 1031, 1038 (11th Cir.1983). Based on this Court's review of the entire voir dire examination of Mr. Alvarez, it appeared that although Mr. Alvarez seemed unsure about what was being asked of him, the ultimate conclusion to be drawn from the examination is that his attitude toward the death penalty would interfere with his making an impartial decision as to Arango's guilt. Moreover, in this Court's opinion such a determination is "unmistakably clear", *Darden v. Wainwright*, 699 F.2d 1031, 1037 (11th Cir.1983), and therefore, Mr. Alvarez' ability to perform his duties as a juror were substantially impaired.

C. JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFTED TO ARANGO THE BURDEN OF PROVING THAT THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES.

[3] Arango alleges as his third ground that "the instructions to the jury at the penalty phase unconstitutionally shifted to Mr. Arango the burden of proving that the mitigating circumstances outweighed the aggravating circumstances, thus violating his rights to due process of law and to be free from cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution."

Upon examining the entire instruction, the Court notes that the trial court gave the Florida Standard Jury instruction. Appendix A at 941-945. However, in addition to the Florida Standard Jury instruction, the trial court gave an additional instruction which made it clear that the jury must find that the aggravating circumstances outweigh the mitigating circumstances. Ap-

4. Mr. Alvarez' voir dire examination appears at Appendix A at 15-17, and again at 97-105

pendix A at 945-946.[8] Examining this instruction as a whole, the Court does not believe that the burden of proof was shifted to Arango in violation of his constitutional rights and so finds as a matter of fact and law.

D.(1) THE TRIAL COURT ERRED IN ADMITTING TESTIMONY FROM THE MEDICAL EXAMINER ALLEGED TO BE HIGHLY IRRELEVANT, PREJUDICIAL AND INFLAMMATORY

[4] As a fourth ground of the Petition for Habeas Corpus, Arango alleged that during the sentencing phase of the proceedings "highly irrelevant, prejudicial and inflammatory testimony from the Medical Examiner regarding his personal opinions of the feelings experienced by the dying victim" were presented to the jury. Petitioner asserts that the presentation of such testimony was violative of his right to a fair trial and to due process of law as provided in the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner further claims that the imposition of the death sentence in light of the testimony of the Medical Examiner would be violative of his Eighth Amendment right against cruel and unusual punishment. The Court finds that this claim raised by Arango is not cognizable in a federal habeas corpus proceeding. Whether the Medical Examiner's testimony was "irrelevant, prejudicial and inflammatory" is a state evidentiary question and beyond the scope of review by Federal Court in considering the issue on a habeas petition. It is settled law that a Federal Court may not review the trial judge's action concerning the admission of evidence. *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 285, 86 L.Ed. 166 (1971); *Woods v. Estelle*, 547 F.2d 269 (5th Cir.1977); *Pless v. Wainwright*, 441 F.2d 56 (5th Cir.1971). As the Supreme Court has stated:

> We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence.... The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason above, render its reception a violation of due process.

Lisenba, 314 U.S. at 228-9, 62 S.Ct. at 286.

[5] The Fifth Circuit states that the mere violation of evidentiary rules does not itself invoke habeas review. The Court must examine the record only to determine whether the error was of such magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause. In analyzing "fundamental fairness" the erroneous admission of prejudicial evidence can justify habeas corpus relief if it is material in the sense of a crucial, critical and highly significant factor. *Woods v. Estelle*, 547 F.2d 269, 271 (5th Cir.1977).

[6] The Court's examination of the record leads it to conclude that if any error was committed in the admission of the Medical Examiner's testimony, it was harmless. From a reading of the testimony presented at trial, it is clear that the Doctor's opinions were based on scientific analysis and any reference he made to his personal experiences served only to simplify his medical findings for the jury.

D(2). THE TRIAL COURT'S INSTRUCTION OF "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCES WAS VAGUE, INCOMPLETE AND FAILED TO ADEQUATELY CHANNEL THE JURY'S DISCRETION

Additionally, as to ground four of the Petition, Arango charges that the trial court's instruction defining the terms "especially heinous, atrocious or cruel" was inadequate in that it was vague and incomplete and that the Petitioner's requested instructions were refused.

8. The entire instruction given by the trial court with regard to this aspect of the case appears at Appendix A at 941-947.

The record indicates that the trial Court instructed the jury on Section 921.141(5)(h), Florida Statutes (1982). The trial Court instructed the jury that "[h]einous means extremely wicked or shockingly evil. Atrocious means outrageous, wicked and vile [and] cruel means designed to inflict a high degree of pain; utter indifference to, or enjoyment of the suffering of others; pitiless." Appendix A at 943. This Section of the Statute was construed by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1975). The Court said that:

> [W]hile it is arguable "that all killings are atrocious . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So.2d [908] at 910 [Fla.1975]. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So.2d [1] at 9 [Fla.1973]. *See also Alford v. State*, 307 So.2d 433, 445 ([Fla.] 1975); *Halliwell v. State, supra*, [323 So.2d 557] at 561 [Fla.1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Id. at 255–56, 96 S.Ct. at 2968.

Although Petitioner asserts that he requested a jury instruction as to the aggravating circumstance of "especially heinous, atrocious or cruel", Petitioner did not submit any such instructions to this Court as an exhibit, nor did any reference to the same in the trial transcript indicate that any instructions were actually requested by Arango as to what is heinous, atrocious or cruel.

[7] This Court finds that in light of the trial court's defining each term individually and in light of *Proffitt*, the instruction was neither vague, incomplete nor inadequate.

E. THE DEATH SENTENCE IMPOSED ON THE PETITIONER IS A CRUEL AND UNUSUAL PUNISHMENT AND IS "TOO GREAT"

Arango asserts as a fifth ground of his Petition that the death sentence imposed upon him is a cruel and unusual punishment in light of all the relevant facts and it thereby contravenes the requirement of proportionality. Counsel for Petitioner requested of the Court an evidentiary hearing on the issue of whether the death penalty under Section 921.141, Florida Statutes (1982), is being applied arbitrarily and capriciously as well as disproportionately in violation of Petitioner's rights under the Eighth and Fourteenth Amendments. The Court finds that such an evidentiary hearing is wholly without merit in a federal habeas petition as the standard of review by this Court is merely to determine whether the trial court and the Florida Supreme Court performed their duty of sentencing Arango under Section 921.141 with care and concern. *Spinkellink v. Wainwright*, 578 F.2d 582, 606 (5th Cir.1978). The record supports a finding that the trial court found the existence of an aggravating circumstance that the crime was "especially heinous, atrocious or cruel", Section 921.141(5)(h), Florida Statutes (1982), Appendix A at 952–3, Appendix B at 149–150, so as to merit the penalty of death. Although the trial court found one of the statutory mitigating circumstances, Arango's lack of prior criminal activity, Section 921.141(6)(a), Florida Statutes (1982), the record establishes that this single circumstance was outweighed by the aggravating circumstance within the meaning of the statute. Appendix A at 951–953 and Appendix B at 149–150. In weighing aggravating and mitigating circumstances the Florida Supreme Court has repeatedly stated that the death penalty statute does not contemplate a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. Instead, it places on the judge the task of weighing all the factors to determine whether the death sentence is appropriate. *Arango v. State*, 411 So.2d 172 (Fla.1982);

White v. State, 403 So.2d 331 (Fla.1981); *Hargrave v. State*, 366 So.2d 1 (Fla.1979).

The Florida death penalty statute has been held constitutional in that it outlines standards in the form of aggravating and mitigating circumstances concerning the nature of the crime, as well as the nature of the criminal, which judges and juries are to follow in exercising their discretion as to which convicted murderers are to die for their crimes and which are to receive life sentences. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1975); *see also State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974) (Section 921.141 held constitutional by Florida Supreme Court). In *Proffitt*, the Supreme Court said:

> [I]n Florida . . . it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." [And therefore], [o]n its face the Florida system thus satisfies the constitutional deficiencies identified in *Furman v. Georgia*, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972).

Proffitt v. Florida, 428 U.S. at 253, 96 S.Ct. at 2967.

[8] The Fifth and Eleventh Circuits state that the federal courts' inquiry of a state court's sentencing procedure need not and should not entail a case-by-case comparison of the facts in a given case with the decisions of the state court in other death penalty cases. *Spinkellink v. Wainwright*, 578 F.2d at 606; *Ford v. Strickland*, 696 F.2d at 819. To provide otherwise, would allow a federal court to quarrel with the state court on its interpretation of the state's statutes. Petitioner has shown no basis for this Court to conclude that the Florida Supreme Court has failed to discharge its statutory duties responsibly and, therefore, this Court finds that the state courts acted through a properly drawn statute with appropriate standards to guide discretion and such discretion was accomplished with care and concern.

F. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE AT TRIAL WHICH HAD BEEN OBTAINED AS THE RESULT OF AN UNLAWFUL, WARRANTLESS ENTRY INTO PETITIONER'S APARTMENT

Petitioner's final assertion is that the search of his apartment and the seizure of evidence therein by the arresting police officers violated his Fourth Amendment rights.

[9, 10] In *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the Supreme Court limited the scope of federal court review of such a Fourth Amendment issue on a habeas corpus petition filed by a state prisoner. The inquiry before this Court is limited to a finding of whether or not Arango was afforded an opportunity to fully and fairly litigate his claim in state court. *Id.* at 494, 96 S.Ct. at 3052. Counsel for Petitioner has represented to this Court, and the record indicates, that this identical issue was fully and fairly litigated during the state proceeding in a motion to suppress hearing by the Florida Supreme Court and affirmance of that ruling. Appendix A at 365-401. Given this representation and mindful of the dictates of the *Stone* case, the Court inquired of Arango's counsel why he should not be precluded from raising the issue before this Court. Counsel responded that the rule of *Stone v. Powell* could be circumvented upon a finding of exigent circumstances or fundamental error.

The Court has been directed to no authority to support this contention. However, in this Court's opinion, no circumstances exist here to warrant circumventing the dictates of *Stone* and no fundamental error exists.

Based upon the above and foregoing and the Court's determination adverse to the Petitioner's position as set forth in this Memorandum Opinion, it is ORDERED AND ADJUDGED as follows:

1. That this Court has jurisdiction over the parties and the subject matter as pertains to the issues heretofore referred to in this Court's Opinion on the grounds that as to each of said issues the Petitioner has exhausted his state remedies.

2. That this Court finds as a matter of law that as to each of the grounds asserted for the issuance of this Court's "Great Writ of Habeas Corpus" that the same are without merit based upon this Memorandum Opinion which this Court will treat in its entirety as this Court's findings of fact and conclusions of law.

3. That the Petition for issuance of this Court's "Great Writ of Habeas Corpus" be and the same is hereby DENIED and this cause be and the same is hereby dismissed with prejudice.

4. That in view of the notification to this Court by the Honorable Sid White, Clerk of the Supreme Court of Florida, that that Court has issued a stay of execution staying the Governor's warrant for imposition of the death penalty as pertains to the Petitioner issued April 6, 1983, the requested stay of execution is now moot; however, based solely on the record before it and the issues presented as set forth in this Memorandum Opinion this Court would not issue a stay of execution.

Dorothy ROSENFELD, Plaintiff,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant.

No. CV-82-1879.

United States District Court, E.D. New York.

May 6, 1983.

Supplemental security income claimant challenged determination of the Secretary of Health and Human Services denying her benefits because her imputed income was too high. The District Court, Weinstein, Chief Judge, held that the Secretary erred in attributing to claimant all the money deposited in a joint bank account with her husband necessitating remand.

Ordered accordingly.

1. Social Security and Public Welfare ⇐8.20

While a court must respect views of the Secretary of Health and Human Services in interpreting a statute committed to his administration, his interpretation is not of controlling significance.

2. Social Security and Public Welfare ⇐175

Where availability of joint income is determinative and income of another is attributed to supplemental security income claimant, needs of other individual must ordinarily be considered; the entire sum cannot automatically be imputed to the claimant.

3. Social Security and Public Welfare ⇐175

In supplemental security income proceeding, the Secretary of Health and Human Services erred in attributing to claimant all the money deposited in a joint bank account with her husband necessitating remand.

4. Joint Tenancy ⇐8

Law of New York limits ownership of funds deposited to a joint account so that, ordinarily, only one half of the money so deposited belongs to each of two tenants.

5. Social Security and Public Welfare ⇐175

The Secretary of Health and Human Services, in determining actual availability of income imputed to a supplemental security income claimant must consider needs of ineligible cotenant who may have to draw on a joint account for his basic requirements of food, living and shelter.

6. Social Security and Public Welfare ⇐175

To the extent that a cotenant of a joint bank account has need of funds in the account reasonably deemed to be his and